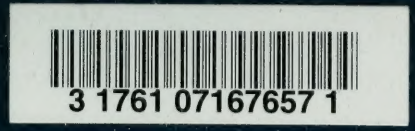
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HISTORY

OF

ROMAN PRIVATE LAW

PART II

In Two Volumes

VOLUME I

CAMBRIDGE UNIVERSITY PRESS
London: FETTER LANE, E.C.
C. F. CLAY, MANAGER

Edinburgh: 100, PRINCES STREET
London: STEVENS AND SONS, LTD., 119 AND 120, CHANCERY LANE
Berlin: A. ASHER AND CO.
Leipzig: F. A. BROCKHAUS
New York: G. P. PUTNAM'S SONS
Bombay and Calcutta: MACMILLAN AND CO., LTD.
Toronto: J. M. DENT AND SONS, LTD.
Tokyo: THE MARUZEN-KABUSHIKI-KAISHA

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HISTORY

OF

ROMAN PRIVATE LAW

PART II

JURISPRUDENCE

VOLUME I

BY

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REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF CAMBRIDGE
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205-064
9.8.26

CAMBRIDGE:
AT THE UNIVERSITY PRESS
1914

Cambridge:
PRINTED BY JOHN CLAY, M.A.
AT THE UNIVERSITY PRESS

DEDICATED, WITH RESPECT AND GRATITUDE,

TO

PAUL FRÉDÉRIC GIRARD,

PROFESSOR IN THE FACULTY OF LAW AT THE UNIVERSITY OF PARIS.

PREFACE

THIS work was written as part of a History of Roman Private Law, which I can scarcely hope to complete but for which I have been collecting notes and other materials during many years. It is therefore intended primarily for readers who take the study of Roman Law with Jurisprudence, and necessarily involves some considerable acquaintance with the former subject. It does not affect to be a Manual, being intended rather for students than candidates for examination: though of course I admit, and have found, that members of the latter class may not infrequently belong to the former. Still, fair notice must be given that an orthodox and established opinion cannot always be expected in the following pages. This must be my apology for a somewhat frequent use of the first person singular: I cannot claim, for my views, the authority of an Austin, or of a Jhering: I only venture to say that, if readers will look up my references, they will generally find something which may enable them to form an opinion of their own: for a good deal of Jurisprudence must remain matter of opinion, and debate, to the end of the chapter.

More apology is, I feel, due to the reader for a somewhat variable use of *italics* and Capital letters. I cannot even claim a German uniformity, in the latter, for Substantives. As a matter of fact, most of the material in this book was first put together for Lectures: in preparing which I used

all the means at my command for emphasizing the main idea which, at the time of the particular Lecture, I specially wished to impress upon my hearers. When therefore it has been a question of defining a noun, or explaining the particular use of an adjective, I find that I have often marked out expressions, for stress, which at other times appear simply as ordinary words. In the last half of the work, the hesitation whether to italicize etc. words and phrases merely because *foreign*, or only when *technical*, has, I fear, led to a great deal of inconsistency.

As I can scarcely call this book a Manual, so neither can I style the List at the end of this Preface a Bibliography. The usual information imparted by Bibliographies has, no doubt, its value: but there are certainly many works on Jurisprudence which I myself have not consulted: many more, probably, of which I have not heard. *This* is only a List of books frequently quoted by me, for which either some abbreviation of style has been employed, or some specification of edition seems necessary. I have but one or two remarks to make upon it. The edition of Austin which I originally used (the 3rd) has had its pagination slightly varied in the 5th, of which later issues are merely a reprint. I have, to the best of my belief, altered every quotation to suit the latter. The views, on the other hand, of Bentham, upon which so much of Austin is founded, are, I believe, better represented by the French Edition of his friend Dumont, of which my copy is very near in date to that of Austin himself in the Inner Temple Library (see Austin[5], p. x), than by the other Editions mentioned below, which are also occasionally quoted. Blackstone (to whose arrangement

the latter part of this work is rather a return) is quoted by reference to the pagination of the original work, which I think is given in the margin of most modern editions. In books less frequently cited I have not always had the means or the time to consult possible later issues. Those which are not in the following List are therefore, except where otherwise stated, mainly of first or single Editions.

May I add, by way of apology, that many of the modern instances and illustrations, notably in § 4, could not be brought up to date, as the earlier part of the Book had to be printed off some time ago, to release type. A very little I have been able to add from more recent experience, e.g. in the note on p. 224; and, within the last fortnight, I hail, as almost too good to be true, an intimation in high quarters which goes a little way towards realization of the Utopian view on p. 281: but it was impossible for me to add full complementary notes, without greatly delaying the publication of a work which has been too long on the stocks already.

A few *corrigenda* are given on p. xi.

E. C. CLARK.

December, 1913.

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CORRIGENDA

p. 116, n. 51, *for* Maxwell[4], 30, 34, 62—66, *read* Maxwell[5], 33, 37, 69—73.
,, 52, *for* Maxwell[4], p. 66, *read* Maxwell[5], p. 73.
p. 118, n. 58, *for* Maxwell[4], etc., *read* Maxwell[5], ch. 9, § 2, and delete pp. 384—390.
p. 126, n. 72, *for* Maxwell[4], etc., *read* Maxwell[5], and delete (392, 393).
p. 170, n. 27, *for* Holland, p. 353, *read* Holland[10], p. 363.
pp. 388—390, *in* Glanville, delete final *e*.
p. 445, n. 33, *for* Markby (Elements[3], ch. 7. 150, 151), *read* Markby (Elements[6], ch. 7, pp. 152, 153).
p. 577, l. 11, *for* heriditas *read* hereditas.
p. 588, n. 43, *for* Halleck, ch. 6 (vol. i. p. 124), *read* Halleck[3] (vol. i. p. 153).
p. 591, n. 48, *for* Halsbury, Digest s. v. vol. vii. etc., *read* Halsbury, vol. vii. s. v.
p. 652, l. 7, *for* interpretation *read* interpolation.
p. 656, l. 6, *for* 46 *read* 50.
p. 660, n. 71, *for* n. 66 *read* n. 67.
p. 666, n. 7, *for* subite *read* subito.
p. 669, top of page, *for* Burgerliches *read* Bürgerliches.
p. 681, last line of text but 3, *for* on *read* or.
p. 712, l. 8. *for* licence *read* licences.
p. 754, l. 15, *for* proper) *read* proper),.
p. 757, l. 10, *for* (p. 755). *read* (p. 755):—.
p. 762, l. 19, *delete* a.
p. 776, n. 7, *for* Austin T. and N. ii. 4. c. *read* ii. 4. C. c.

THE LIST REFERRED TO ABOVE

A.G. or N.A. Aulus Gellius. Teubner, 1861.

Anson. Law and Custom of the Constitution. i. Parliament, 4th ed. (revised) 1907, ii. Crown, 3rd ed., 1907, 1908.

Austin. Jurisprudence (Campbell), 5th ed., 1875.

—— St., Student's ed. of Austin 1875. I have compared this edition with later issues, which are simply reprints.

Bentham. Fragment on Government (a Comment on the Introduction to Blackstone), 2nd ed. enlarged, 1823. The 1st, which is the one among Austin's books in the Inner Temple Library, was published anonymously at Dublin, 1776.

—— Traités de Législation, etc., par Ét. Dumont, 2nd ed., 1820. (The 3rd vol. contains the important Vue Générale d'un Corps Complet de Législation.)

—— Theory of Legislation. Translation by Hildreth, 1864.

—— Principles of Morals and Legislation. Oxford, 1879.

—— Works (Bowring), 1843.

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Bracton. Tottel, 1569.

Brown (Jethro). The Austinian Theory of Law.

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Bruns. Fontes Juris Romani Antiqui. 6th ed., 1893.

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Burge's Colonial and Foreign Law. New ed., 1907.

Collectio Librorum Juris Anteiustiniani, ed. 5, 1905.

Corssen. Aussprache, &c. 2nd ed., 1868.

Cuq. Institutions Juridiques des Romains. T. i, 1891, T. ii, 1902. (The 1st ed., which I have found more informing and suggestive than the 2nd.)

Curtius. Grundzüge der Griechischen Etymologie. 5th ed., 1879.

Dernburg. Das bürgerliche Recht des Deutschen Reichs. 3rd ed., 1906.

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Digest of English Civil Law (Jenks), from 1905 (unfinished).

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—— Abdy and Walker. 3rd ed., 1885.

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Grotius De Jure, &c. (Whewell), 1853.

Hale's Common Law. Runnington, 1779. The part mostly referred to is the "Analysis of the Civil Part of the Law."

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—— Rechts-Lexicon. 3rd ed., 1880.

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Karlowa. Römische Rechtsgeschichte. 1888 (unfinished).

—— C. P. Civilprozess. 1872.

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L. Q. R. Law Quarterly Review.

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P. J. Practical Jurisprudence. Clark, 1883.

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—— Roman Private Law (R. P. L.). 1902.

Salkowski. Institutes. Tr. Whitfield. 1886.

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Schmid. Gesetze der Angelsachsen. 2nd ed., 1858.

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PART II

§ 1. JURISPRUDENCE

JURISPRUDENCE defined, pp. 1—3. Jurisprudence as a Science formal and analytical, 4, 5. Jurisprudence general or comparative, and particular, 6, 7. Claim of universality, 7—9. Its practical uses: (1) In Law-making, 10—14; (2) In Legal Education, 14, 15. Austin's Jurisprudence, 16, 17; as a programme, 18. Definition, Source, Mode and Form, 19—22. Morality and Law, 22—24. Law and the State, 24—26. Modes and Forms, 26—29. Analysis of pervading notions, 29—31. Purposes and Subjects, 31—34. Necessity of a practical application, 34, 35. Special connexion with Roman Law, 35—39.

Jurisprudence. In a work dealing with the historical developement of any nation's Law, the *origin* of the Law in question, so far as we can read it, the different *modes* in which the Law has been made, and the *forms* in which it has come down to our knowledge, are necessarily prominent points for consideration. The concentration, moreover, of the history in hand, as far as possible, on the subject of *private* Law, involves some enquiry into the recognised *subdivisions* of a body of Law, by the different *subjects* with which it is conversant. On all these matters some preliminary explanation is required; the result being that the reader of this particular kind of history is committed, whether he will or no, to a slight acquaintance with the somewhat unattractive

study of which they form a principal part. The nature of that study I must first endeavour briefly to explain, as the name of Jurisprudence has been used in several senses having but slight connexion with one another. At the same time it may be allowable to add a few remarks upon the subject of Jurisprudence regarded in rather a wider point of view than its mere connexion with the present work, namely as to its general practical utility, and, in particular, as to its proper place in a course of legal education. The work of Austin, to which reference will so often have to be made hereafter, contains a definition of Jurisprudence and an "Essay on the uses of its study," which were put together, under the latter heading, by Mrs Austin and come at the end of Campbell's larger edition, but are printed in his "Student's Austin" as Lecture 11. They ought certainly to be read as an Introduction to the rest of the work, and are necessarily much referred to in the present section.

Prudens and *prudentia*, as originally and chiefly used, by the great Roman Jurists, in connexion with *jus*, meant little more than a professional acquaintance with their own Law, in somewhat special reference, perhaps, to so much of it as depended rather on custom and practice than on direct legislation. From this idea of professional knowledge and practice is obviously derived a later use of the word *jurisprudentia*, found for instance in Justinian's Code and Institutes, to signify the instrumentality of Jurists in the *modification* of Law, mainly as to its non-statutory part[1]. There are, thirdly, a few traces of a very different signification, attached to the word by members of the final group of that great series which culminates in Ulpian. By him, in accordance with the idea of a Law of Nature, universal and prior to human legislation in any sense, we find Jurisprudence

[1] See Cod. 7. 32. 1: Instt. 3. 2. 3.

spoken of as a Philosophy—perhaps indeed the only true Philosophy—aiming at the moral improvement of men, and studying an ideal *jus* which is invariable and independent of any actual systems of Law[2].

These three meanings of Jurisprudence are each of them reproduced to some extent in modern language. With several quite recent text-book writers, in spite of the very reasonable objection taken by Prof. Holland[3], Jurisprudence means simply the *knowledge* of a particular body, or even a particular branch, of Law. The view of Ulpian is occasionally represented, under the title of Jurisprudence, by discussions of the Philosophy of Law and expositions of what is termed Natural Jurisprudence[4]. And the more technical use of the word by Justinian is somewhat paralleled by the *Jurisprudence* of French and *Jurisprudenz* of German writers, so far as those words are occasionally used to express what has been called Doctrinal Interpretation, though they are now perhaps more generally taken to mean the authority or quasi-authority of a series of judicial decisions[5].

No question is here intended as to the comparative utility of the subjects or studies above mentioned, or as to the propriety of the term Jurisprudence being applied to any of them: they are merely mentioned in order to exclude them from consideration in this and the following sections, which deal with Jurisprudence in a fourth and entirely different sense. To express that sense I must still use Austin's definition of Jurisprudence, in respect of method

[2] Ulpian, Dig. 1. 1. 1. 1: 1. 1. 10. 2. Cf. Paulus, Dig. 1. 1. 11. pr.: Justinian, Instt. 1. 2. 11. The first passage is taken *in extenso* below, p. 49—51.

[3] Holland[10], p. 4.

[4] See Salmond[2], p. 2. Among modern instances may be cited Lorimer's Institutes of Law and Miller's Lectures on the Philosophy of Law.

[5] See below, on Doctrinal Interpretation, pp. 123, 124, and on Case Law on the Continent, § 8. pp. 401, 402.

and subject-matter, as "the Science of Positive Law." For although the terms in this definition are neither at first sight very clear nor in the end quite satisfactory, they do serve to suggest true points of distinction, the appreciation of which is important, better than some other definitions, *primâ facie* open to less exception but more limited in comprehensiveness and generality of view.

Jurisprudence, as a Science, formal and analytical. The subject-matter of Jurisprudence, and, in particular, the most significant use of the word Positive, will require fuller consideration hereafter. At present we will assume that subject-matter to consist of such Law as is now, or has at some past time been, in *actual working existence*, and speak only of the manner in which it is here to be treated.

In describing Jurisprudence as a Science, we do not, as has been intimated, use that word in the bare original sense of knowledge, but with a special modern meaning which is partially though not entirely expressed in the antithesis of a Science to an Art or Craft. Arts and Crafts deal with knowledge, as well as Science does, but in a different way. They have to do rather with the direct application of knowledge to practical ends. Something like this was probably the meaning of Celsus, when he defined Law as "the Art of what is equitable and good[6]." But this is not, I think, *our* conception of a Science as the systematisation of knowledge *per se*.

Accordingly the phrase "Practical Jurisprudence," meaning an applied knowledge of the laws of a State, is an absolute misnomer, or contradiction in terms, if Jurisprudence is to bear the sense which is given it by Austin and which it

[6] See below, § 2, p. 44. This is most probably the Celsus who was adviser to the law-reforming Emperor Hadrian. See Sources, p. 115. Cicero, on the other hand, in speaking of the *ars* of Sulpicius (Brutus, 41, 42; 152, 153), apparently means a systematic or scientific treatment.

bears in the present work. I now regret having used that phrase, as the title to my own "Comment on Austin," in a quite different sense, liable I fear to misconception, as denoting an appeal from Austin to reality (see below, p. 17).

A further step towards the definition of Jurisprudence, as to its method, is suggested by Professor Holland, in limiting this to a particular class of sciences as *formal or analytical*[7]. I must confess that I do not clearly understand his explanation of a *formal* as distinguished from a *material* science[8]. On reading the statement, however, in the light of its subsequent illustrations, I take the point of defining Jurisprudence as a "formal" science to be, that it is understood to deal merely with *generalisations* on the subject of Law, or with such *pervading principles*, to use Austin's excellent phrase, as underlie and account for the individual phaenomena or observed facts. The resulting statements resemble, as to literary form, the definitions and axioms of Mathematics.

The meaning of the term "analytical," which has been specially used as distinctive of the Austinian school of Jurists, is more clear, but is sometimes, I think, misapprehended, as merely conveying the idea that the authors in question confine themselves to a subject-matter of ascertained facts, and reject all *a priori* assumptions[9]. This is true, but might be equally true as to any accumulation of actual knowledge. The special analytical character of the Austinian Jurisprudence consists rather in the fact that it endeavours to arrive at general or "pervading" principles by analysing the complex phaenomena of conduct or opinion observed in ordinary life, and resolving them, where possible, into simpler

[7] Holland[10], p. 6.

[8] Nor does it appear to have exactly satisfied Professor Lefroy in his article on Jurisprudence L. Q. R. xxvii. 182.

[9] Some foundation for this view may have been found in Maine, E. H. 12. 343.

components common to many or all of a particular class of such phaenomena[10].

Jurisprudence general or comparative, and particular. The method of Jurisprudence as above described necessarily presupposes an amount of comparison[11], because its generalisations are arrived at by comparing together similar phaenomena and abstracting from them their common element. But, under what is sometimes spoken of, in the phraseology of legal education, as "Comparative" Jurisprudence, comparison of a wider scope is usually intended, i.e. the comparison of different legal systems.

The generalisations above referred to may indeed be attained, to a considerable extent, by abstraction from the rules and instances of *one* particular body or system of Law. In such a case the results might, in reference to the source from which they are derived, be styled Particular[12], as opposed to General or Comparative Jurisprudence; the two last words, in this opposition, being simply synonymous. Something like a Particular Jurisprudence of this kind, in respect of Roman Law, appears to have been intended by Cicero in a passage of the De Oratore, where he describes, in some detail, the project of what he terms an "Art of Law[13]."

The Jurisprudence, however, with which we are dealing —Jurisprudence *sans phrase*—is usually understood to be of a General or Comparative character in the wider sense, and affects to treat of the principles, notions and distinctions common to most or all systems of Law, among races that

[10] Austin[5], p. 1075: Student, 11. 151.

[11] See Austin[5], pp. 1076, 1077.

[12] Holland[10], p. 10.

[13] Cicero, de Oratore, 1. 42. See Holland, p. 6; also above, n. 6, for the distinction between "Art" on the one hand as meaning, in these words of Cicero, almost what we should call a Science; and, on the other, as implying, in Celsus' definition of Law, the application of a moral or philosophical standard to ordinary life.

have attained any appreciable degree of order and civilisation[14]. The latter limitation seems reasonable and necessary, but the degree of advance, e.g. in Austin's "refined communities," should not be pressed too much to the exclusion of earlier conditions. One of the chief faults, as it seems to me, of the Austinian Jurisprudence, is the practical confinement of its view to a comparatively late developement of Political Society, when a recognition of preceding stages might, besides its mere historical interest, have possibly furnished an illuminating analogy to modern legal phaenomena which, as we shall see, do not fit at all well into Austin's rigid system. I am not here referring merely to International and Constitutional Law—denied that name by him—but to that part of ordinary Law which arises directly out of the Administration of Justice. In this, a certain uniformity, both of basis and formation, differing from Austin's view of the subject, may I think be traced, with material advantage, on a comparison of the ancient with the modern. At all events, the more historical treatment of Jurisprudence above indicated is clearly germane to an enquiry like the present, which purports to deal with the historical developement of a particular system of national Law.

The claim of Universality. Hobbes, when proceeding to define Law in the well-known 26th chapter of the Leviathan, states his intention to shew "not what is Law here or there, but what is Law." The claim of universality here implied has been more expressly made, in our own times, for the generalisations of Jurisprudence. Professor Holland, for instance, on the analogy of a Natural Science like Geology, constructed, say, from observation of English strata alone, holds that the principles of Jurisprudence, though arrived at entirely from data of our own country, would be true if applied to the laws of any other community

[14] Austin[5], pp. 1072, 1077; Student, 11. 151.

of human beings. The actual parallel cited by him is perhaps open to question, for I believe we might find ourselves at fault in expecting the *order*, for instance, of English *strata* to obtain everywhere, even on the neighbouring continent. At any rate Professor Holland rightly makes his conclusion subject to the important proviso "assuming the latter to resemble in essentials the human beings who inhabit England[15]."

To a somewhat similar effect Austin, sailing perilously near to what, in another, he would have stigmatised as *à priori* reasoning, speaks of the resemblances between different legal systems being "bottomed in the common nature of man[16]," and elsewhere of certain *necessary* principles, notions and definitions such that we cannot imagine coherently a system of Law as evolved in a refined community without considering them as constituent parts of it[17]. As examples he instances Duty, Right, Liberty, Injury, Punishment, Redress, with their various relations, as conceived by him, to one another and to Law, Sovereignty and Independent Political Society.

When we look closely into the subjects treated by Jurisprudence we see that while some of these—questions for instance of *mode* and *form* in the making or growth of Law —may actually be matter of generalisation from observed legal systems, a large number of the principles and ideas alleged or defined will be found to depend upon appeals to *common sense*, in the full meaning of that phrase, i.e. general feeling as well as ordinary apprehension (see below, p. 106). This is certainly true of a great deal, and probably the best part, of the reasoning of Hobbes: such sweeping

[15] Holland, p. 11. See, on the same question of generalisation from one case, Dicey[7], p. 70, and below, § 6. p. 326.

[16] Austin[5], p. 1077.

[17] Austin[5], p. 1073; Student, 11. 149, 150.

statements, on the other hand, as that of his original "state of Nature" being little more than mere assumption, though possibly suggested by an exceptionally horrible condition of Europe in his own recent experience[18].

Still, neither for individual principles nor their relations, would I venture to claim universality or "necessity," except perhaps with regard to an antithesis which is certainly *not* accepted, as intrinsically fundamental, by the Austinian, or at least the Benthamite school (see below, p. 22). A distinction between Right and Wrong; in other words an *absolute* approval of some actions and disapproval of others—not at all necessarily of *the same*, in different races or bodies of men—is so far admitted as universal by competent modern observers (see p. 96), that I am at least in good company if I venture provisionally to call this a fundamental principle of human nature, a mode or form of thought essential to the human mind.

Further, while it is obviously true that any developed or refined system of Law is, to modern thinkers, inconceivable without a distinct recognition of the notions enumerated by Austin; the relations which he states as existing between them are of so contested a character that neither on their relations, nor indeed on the definition of the "notions" themselves, shall we find much general agreement, save among those, perhaps, who accept the fundamental principle for which I have just contended.

Finally, as to the universality claimed for the conclusions of Jurisprudence, we must note that they have hitherto been mainly based on the observed developement, moral and political, of states or races springing, as the Science of Language shews us, from one common stock. Between the legal principles and ideas of these Aryan peoples there might be expected some general resemblance, such as has in fact

[18] See Grotius' Prolegomena, § 28 and P. J. pp. 101, 143.

been attributed by several authors to that original unity of descent[19]. It is possible that the fuller comparison, which modern research renders possible, with cases of national developement outside the Aryan group, may justify a more confident approximation to the claim of universality for the definitions and axioms of Jurisprudence[20]. At present I think they must be regarded as provisional or (though in a fairly wide area) local; and as dependent, for their utility, less upon their claim to universal or absolute truth than upon their clearness of statement and the degree in which they can commend themselves to ordinary feeling and understanding.

Practical uses of Jurisprudence. 1. In Law-making. I conceive the highest ultimate utility of Jurisprudence to be as a means towards the better making of Law, under which I include a great deal more than mere statutory enactment. To this use Austin appears to refer when he speaks of a Science of Legislation which is occasionally, though incorrectly, combined with Jurisprudence proper, under the latter single title. *This* "Science," however, is explained to treat of Law as it *ought* to be, or would be if conforming to the Law of God; it has to do with an ideal rather than with actual systems, whereas Austin's other science, Jurisprudence, deals with the general principles, notions and distinctions of Law simply as it is or has been, but not necessarily

[19] See in Crane and Moses, Politics, the interesting chapter 7. on Instinct as a Factor of Political Organization; and Jhering's "Evolution of the Aryan" generally, &c., &c.

[20] See Prof. Lambert's Réfutation de la théorie romano-canonique, §§ 4. and 5., in his Études de droit commun législatif, i. 231—389. In Semitic races, at first sight of their traditions, the Origin of Law would appear to correspond very definitely with the Austinian idea of simple command, rather than with any moral distinction such as that of the Aryan Right and Wrong. But it seems far from improbable that these supposed original commands are the codification or publication of principles already tacitly acted upon in administration of justice.

with any reference to a standard or direction to a practical end[21].

Something like the combination referred to by Austin is attempted in Bentham's "Principles" or "Theory" of Legislation. This work, as expounded by Dumont, deals with the proper Ends or Objects of Law—which are summed up by the author under the head of General Utility—and the comparative merit of the different means adopted for attaining them. It is plainly unnecessary to urge the great interest and value of such a study, for all who may at some time aspire to the position of law reformer or legislator; and its consequent utility to the public. A few words may however be said here upon its connexion with Jurisprudence proper, as a study for public men in general, before we come to consider the latter subject as a matter of legal education in particular.

As we look at the yearly additions to our English Statute-book, we must feel that clearness and consistency cannot be much relied upon in direct legislation by a popular assembly, with unlimited power of "amendment" by individual legislators, the majority of whom, though they may not treat everything as a party question, are yet in the main as ignorant of the general principles, notions and distinctions of Law as they are of Political Economy. I fear it would be a counsel of perfection to prescribe a study of Jurisprudence as a panacea for this common blemish in the more democratic Parliamentary Legislatures. The main hope for greater brevity, clearness and consistency lies perhaps in a greater appreciation and use of expert committees. For members of these, at any rate, some knowledge of general legal principles and ideas would seem to be a feasible *desideratum*. But all persons of any reading or experience must recognise the

[21] Austin[5], pp. 1072, 1078. Cf. Analysis of Lectures 1—6. p. 83 and 5. pp. 172, 173, &c.

inevitable limitations of Statutory Legislation. My present argument relates rather to that much larger branch of Law which is based avowedly in England upon the decisions of our judges, but comes also, undoubtedly elsewhere, and more in England perhaps than is generally admitted, from the work of such other members of the legal profession as prove themselves competent to write on their subject. It is in this direction—that of Case and Text-book Law—that we may reasonably look, not only for the application of our statutes to current requirements but for the gradual improvement of our Corpus Juris as a whole, and indeed for the making of our Law known at all to the laity or even to the ordinary members of the legal profession. All these beneficial results may, it is hoped, be at least accelerated, in proportion as our lawyers in general, who may develope into legal writers, judges or members of Parliament, give more study to some scientific introductory matter, instead of plunging *in medias res*, as most intending practitioners did in former times and many still continue to do[22]. The place of such matter in the detail of legal education will be considered presently (p. 15).

The above remarks, on the better Law-making which might result from a wider study of Jurisprudence, refer, no doubt, more directly to an acquisition of the general principles of the student's own national Law. But, beyond these, the larger conclusions to be arrived at from a comparison of different national systems are of a double service to the purely home legislator or reformer. On the one hand they may supplement the *lacunae* and elucidate the obscurities of his own "particular" Jurisprudence (see above, p. 6); on the

[22] A good deal of what is here written was suggested by Lord Halsbury's Introduction to his Laws of England, though I should give even more weight than is there given to the text-book writers of that most valuable Digest, and should demur to his lordship's endorsement of Austin's criticisms on the Code of Justinian.

other they mark out so much of legal principles, notions and distinctions as has been sanctioned by general consent and is therefore likely to have substantial utility for its basis (see below, p. 38).

For those, moreover, to whom the Foreign Policy of their country may be a possible object for service, or even guidance, I may add to all these considerations the important advantage that lies in the acquisition of a *common legal vocabulary*, for the clearer expression and exposition of treaties or other international transactions. To the formation of such a vocabulary a widely and truly comparative Jurisprudence will most materially aid; particularly if care be taken, as it might in works on the subject, that the technical phraseology devised or selected is generally capable of an adequate rendering in at least the more important European languages. The existence, or otherwise, of such capacity will often very satisfactorily test clearness of conception, and detect a certain begging of questions to which the exclusive use of one's own language is almost unavoidably liable (see below, p. 39).

Before I leave this subject and pass to the more elementary use of Jurisprudence, in Legal Education, I should enter a caution, that while we regard this study as a valuable, and indeed essential preliminary to any sound Theory of Legislation, the two must not be confused, or encroach on one another's province[23]. Austin, with his usual logical consistency, only allows a reference to the ideal or end contemplated by past legislators, as *sometimes* a necessary means of *interpretation*, for understanding the actual, but obscure, law (see ll. cc. above, n. 21); and the fault which renders most of the older works on Law in general, and many of the modern

[23] See Maine, E. H. p. 343: Bentham, Principles, p. 324. On the distinction to be maintained between the *generalisations* and the *suggestions* of the text-book writer, see below, § 8. pp. 389, 391, 395, 401 and § 9. pp. 415, 418: for the true meaning and effect of an ideal *jus naturae*, below, pp. 27, 28.

ones, next to useless, is the indiscriminate admission, on an equal footing, of principles sanctioned by practice and principles only suggested in theory. The exclusion of the latter from his Jurisprudence is one of Austin's great services, and is what seems to me to be the gist of our defining Jurisprudence (though not in his sense of Positive), as the Science of *Positive* Law (see below, § 2, p. 69).

Practical uses of Jurisprudence. 2. In Legal Education. I come lastly to consider the proper place and function of Jurisprudence in an ordinary working course of legal education; not forgetting the modern influence of examination systems, which must, in all probability, continue inevitably to prescribe their course of reading to ninety-nine out of any hundred students of Law.

An entire separation of the Pass and Honour courses, in the Faculty in question, where it amounts to the exclusion of this or that branch of reading *in toto*, is not, to my mind, very satisfactory: but, if they have to be so separated, Jurisprudence should certainly be confined to the students of superior capacity, or at least of application enough to take some intellectual interest in a subject which is neither easy nor of an obviously "paying" character. Anything more discouraging and useless, if not actively prejudicial, than "cramming" the arid *dicta* of Austin, or the more attractive sentences of Maine, cannot well be conceived. I do not see the same reason for confining Jurisprudence, at any rate in an elementary form, to what is called the higher branch of the profession, though the exclusion, from the Solicitors' curriculum, of Roman Law, if maintained, will prevent that connexion of the two studies which, apart from the particular object of the present work, I myself wish to advocate (see below, p. 35).

But, within the subject of Jurisprudence itself, there certainly appears to me, from some experience in lecturing

and examining, to be room for a division into elementary and advanced. The former can, I believe, be taken with real utility, at the outset of any higher or more scientific study of Law. But it is obvious that such Jurisprudence as proceeds to any Theory of Legislation cannot be essayed with success until some detailed knowledge has been acquired of one or more present systems, in their working existence—notably, of the student's own national Law. Accordingly, in the course of study formerly marked out by the University of London, as an examining body, Jurisprudence, when coupled with Principles of Legislation, was confined to those advanced students who aspired to the highest legal degree of Doctor, and whose acquaintance not only with Roman but with English Law had been tested before their admission to the degree of Bachelor. By the same University, on the other hand, Austin's Lectures *in extenso* were required, together with the Roman Institutional works, from candidates for the first (Intermediate) Examination[24]. Both the distinction and the connexion appear to me to have had good reason; the only fault lay in assigning, to the earlier course, the whole of a difficult book, parts of which too (see below, p. 33) did really require and assume an amount of varied and detailed knowledge scarcely to be expected from a younger student, even of the hard-working class who used to present themselves for the London examinations. This has been one of the principal difficulties in the use, at an early stage in legal education, of the important work to which I must now devote a few general remarks, in the endeavour to shew, on the one hand, the intrinsic value

[24] Under the present arrangement Jurisprudence "Analytical and Historical" is the subject of one paper in the Intermediate (Pass) Examination. The scope of this subject will possibly depend upon the text-book mainly employed. "Comparative Jurisprudence" is one of several alternative subjects in the LL.B. Examination, Pass and Honour; the paper in the latter case being described as "Advanced."

of the subjects therein treated and, on the other, a possibility of their treatment, in a more useful way, as introductory matter.

Austin. In Jurisprudence, at least for English readers, Austin's Lectures long held the field. His conclusions, and some of the criticisms upon them, are also, by this time, fairly well known abroad; while his work, pure and simple, is still retained, by more than one English educational body, for students in Law; though less, perhaps, from satisfaction as to its present utility than from difficulty in its replacement. Due weight, too, must be allowed to a feeling of the great services rendered by the author, in his time, to the study of Jurisprudence; services which can scarcely be put too high, whether we consider his successful elimination of the pseudo-philosophical reasoning, which renders most of his predecessors' writings so untrustworthy, or his critical investigation of popular conceptions and his strenuous endeavour to elucidate those "pervading ideas" on which he saw the importance of clear apprehension and the unsatisfactorily complacent character of prevalent assumptions.

And yet, I think, a large number if not a majority of teachers in Law will question whether the time and trouble spent by commencing students on Austin might not be better employed. Besides the fact above stated, that many of his illustrations postulate a variety of knowledge not likely or even possible in a beginner, there is first of all to be taken into account the mere *length* of more than 50 lectures, written on a difficult subject and in a style by no means attractive to the best disposed reader. The book certainly deserves and requires to be read as a whole; for almost all the subjects treated in it are of equally great importance, and the logical sequence of ideas, which is one of Austin's greatest educational merits, suffers considerably by omission or even by compression. The latter objection lies against taking as

a substitute for Austin proper the abridged Student's Edition, which requires shorter time for reading and which moreover often supplements Austin's text with necessary additions required by a later state of modern Law[25].

But there are graver objections to Austin than difficulty and length. Even his strongest admirers must admit that many of his positions, on matters ethical or psychological connected with Law, are anything but universally accepted by the feeling and belief of to-day; while several of his statements as to historical fact have been questioned and rejected; in both cases, perhaps, mainly owing to research made, and knowledge acquired, since the writer's time.

Such questionings have naturally led to a treatment of Austin which materially enhances the difficulty, at least to a conscientious teacher, of employing his work in the early part of a legal education. Comments, and suggested amendments, and apologies, have followed on the original, and on one another until—I will not say "none can see Valerius"—but there is certainly a growing wish to get both him and most of the superincumbent matter out of the way. I may here mention a work, to which I find it convenient occasionally to refer, as it contains a good many useful quotations given at length—an attempt made by myself a quarter of a century ago, in the nature of an appeal, on the one hand to philology and ancient literature, on the other, to general or popular understanding and the ordinary use of words, against the Austinian dogmas[26]. But I do not gather that this work has done much to simplify the subject, and I am afraid that my use of the term Practical, in its title, has been considered

[25] That there is still a great demand for Austin is shewn by the fact that the 5th edition (of 1885) has been twice reprinted. The Student's edition has also run to eleven "impressions," these, however, being, so far as I can trace, simply reprints of that first issued, in 1875.

[26] Practical Jurisprudence, A Comment on Austin, here referred to as "P. J."

an additional confusion (see above, p. 5), if not a *mauvaise plaisanterie*.

In fine, whatever merit may be allowed to this or to better known comments on Austin, others besides myself have long been convinced that his Lectures, coupled as they must unavoidably be with a considerable amount of reference to later writers, cannot well be used *in extenso* as an introductory work, though they may form an admirable exercise for the more independent thought of advanced students.

But, on the other hand, whether we agree with Austin or not, his *scheme* may still be admitted to supply an excellent programme for beginners in the higher class of legal education. For it does appear, to me, very clearly to mark out just those matters which most require some preliminary consideration in the scientific study of any system of Law. Only, they need to be treated in a shorter and possibly more attractive manner, the points raised by Austin being clearly indicated, together with the chief amendments required by the results of later investigation or fair modern criticism.

For the production of the kind of Manual, which I think is still a *desideratum* in the study of Jurisprudence generally, I do not feel myself particularly marked out, having been mainly driven into the subject by a strong revulsion against Austin and Bentham. But it appeared to me that there might be some use in setting forth the principal questions with which my own experience suggests that such a Manual should deal, so far as they are capable of illustration by Roman Law, and by Roman Law not merely of a particular period but as a matter of historical developement (see above, p. 9). For I propose to treat Jurisprudence here, as I think it always should be treated, in the main from a historical point of view[27].

[27] My idea of Historical Jurisprudence differs so far from Professor Jethro Brown's that it regards ruling principles rather than latent causes. See The Austinian Theory of Law, pp. 358, 359. Also Professor Lefroy's article in L. Q. R. xxvii. 184.

This point of view necessarily involves not only differences in substance from Austin but some modifications in his *order* of subject-matter. I shall now, therefore, pass through his principal headings with reference to these modifications; expressing at the same time my own opinion as to the most profitable way of reading his Jurisprudence, if still retained as a text-book.

Definition, Source, Mode and Form. How far definitions and axioms are really a help at the outset of legal study, and what is their special use, are questions on which I shall have to say a few words later on (below, p. 35 and § 2, p. 90). They seem generally to have been thought unavoidable by most writers who have taken in hand any wide field or whole system of Law. So, without further preface, we may begin by enquiring what is meant by Law in general and what is the point of confining the province of Jurisprudence to Law Positive. In the course of this enquiry we shall naturally have to examine in detail the well-known definition which, with some ancillary matter, and one considerable digression (see below, p. 23) occupies the first quarter (Lectures 1—6) of Austin's Jurisprudence. This definition has undoubtedly served to clear away much haziness in previous conceptions of Law. But, on the other hand, its author's reduction of all Law, with which Jurisprudence has to do, to the command of a Sovereign, has for some time ceased to be generally considered satisfactory, and is admitted, even by its present defenders, to be inadequate. It is not merely that there are important rules of human conduct, such as Constitutional and International Law, universally regarded *as* Law, but which cannot be brought under Austin's rigid formula. Even with such as can be so brought, to lay down this formula at the outset, as a sufficient definition, relegates to a later part of the work (the third quarter), as grounds on the whole merely for classification or

subdivision, questions, the direct and primary consideration of which has been found, by others as well as myself, inseparable from any adequate conception of Law at all. On Lectures 12—27 I have to speak hereafter (see p. 29).

The second volume of Campbell's edition of Austin treats of the received classifications of Law, which depend upon certain observed distinctions. The latter are again distinguished by Austin into two groups, those which relate to its Sources and Modes and those which relate to its Subject-matter.

The distinctions by Subject-matter are naturally separated from the others by the fact that they have always constituted the main *working divisions* of a Corpus Juris: branches of Law being in practice determined by Subjects (see below, p. 32) irrespective of Source or Mode, whereas the latter have been for the most part matter of scientific classification only, in which *they* are, coupled with the cognate idea Form, of more prominent importance.

The sense in which the last three words are used is rather more than a mere matter of terminology. What we mean to consider is clear enough when we speak of the Modes in which Law is made or grows and the Forms in which we find it[28]. But in Source, as a *juridical* term, distinguished that is from the *literary* sense of earliest extant documents (see my Sources, p. 11), a controversy is involved

[28] Austin's heading is "Law in relation to its Sources, and to the Modes in which it begins *and ends*." The subject, however, of Abrogation or other "ending" (Austin, Outline, p. 41), finds no very definite place in the actual course of lectures. Possibly Austin considered it to be implicitly treated *e converso* with the Modes in which Law *begins* (see P. J. p. 198). The addition of Forms to Austin's Sources and Modes was first suggested to me by a sense somewhat hesitatingly given, in Markby's Elements[6] (§ 60), to the word Source—that of *present* literary authority. Upon this idea, in fact, was based my own classification of legal rules as Statute, Case or Text-book Law (P. J. Pt. ii.); a classification, however, not so suitable to the Roman system at present under consideration, as to the English; true Case Law being comparatively unimportant in the former while all-important in the latter (see below, p. 28).

at the outset. Austin, who prefers to use the word in its juridical sense, employs it to designate the "legislative author" from whom each particular rule of Law emanates "immediately," that is without the intervention of any other person[29]. Now, besides the fact that it is often difficult specifically to assign such an immediate author, it will also be often questioned whether he can reasonably be regarded as a Source, in the ordinary meaning of Fountain-head. Not only in popular phraseology but in Law books proper we shall still hear of General Custom, Professional Practice—even sometimes of "Nature"—as Sources of Law. These are, according to Austin, "juridical Sources loosely or improperly so called"; and he accordingly devotes a considerable part of the third quarter of his work (Lectures 28—39) to their discussion and rejection. In whatever light, however, they are regarded, the connexion of these subjects with that of Mode and Form is obvious, and the consideration of them, as something rather more than mere causes or occasions, forces itself on our attention not only in any attempt to trace Law to its earliest origin—a matter practically omitted by Austin —but in any full enquiry into its later growth and formation, down to the present day. In any case, the whole matter, whether treated generally under the head of Mode and Form or partly under that of Ultimate Principles, belongs, as between Definitions and Divisions, distinctly to the former branch, where it is correctly placed by Professor Holland (Pt. i. ch. 5).

The statement and criticism, therefore, of Austin's Definition of Positive Law (§ 2) will be closely followed, in the present work, by a discussion of Modes and Forms. But before coming to treat of the latter in specific detail, I have found it necessary to deal with two questions of a more fundamental character. Section 3, the main subject of which

[29] Austin[5], Outline, p. 34: Lectures 28. 510; 30. 537.

is the connexion of Morality, as ordinarily understood, with Law, is an endeavour to shew that Moral Feeling, in this connexion, forms a considerable part of what is vaguely called Custom, and does constitute a true and important Source of Law, as developed in the Administration of Justice. Section 4 (Law and the State) is devoted primarily to a discussion of the modern conception of a State, the divisibility and mutual relation of Sovereign functions, and cognate questions arising more or less directly out of Austin's 6th Lecture: secondly to an independent investigation of the various forms of Constitutional Law and their sanctions. The greater part of this subject is modern; but, besides its great importance and present interest, it is, I think, capable of being treated in a broad manner, without the introduction of too much technical detail for an elementary work (see pp. 15 and 33). A historical enquiry into the origin of certain ancient states, which has little to do with Austin and bears only upon the earlier times of legal growth, will appear, if at all, as an Appendix to a later part of the present work (Pre-Republican Period, see Sources, p. 147).

Morality and Law. Bentham's diatribe on the word *ought*[30] has probably ceased to be regarded with any feeling but wonder and amusement: but his teaching has borne sad fruit in a mind meant, may I venture to say, for higher things. At the present day it might certainly seem desirable to most thinkers, in defining Law, to take some account of the idea of Right, Wrong and Duty in the ordinary or popular acceptation of the words, which, whether very clear or not, is certainly very different from that of Austin, so far as Right or Wrong *in general* is treated by him at all. For he mostly confines himself to the consideration of *particular* Rights and

[30] See Whewell's History of Moral Philosophy in England, p. 227. His reference, however, to the *passage*, is incorrect, being apparently to the Introduction of Bowring, i. 31.

Wrongs created or recognised by Law; these being dealt with in the second quarter of his work, the Analysis of Pervading Notions, Lectures 12—27 (see below, p. 29).

Now Morality, under the ordinary sense—or perhaps a little wider than the ordinary sense (see below, § 3, p. 110)—of the word, if we may not call it at once a Source, has at any rate, as I hope to shew, a very special function as a material or constituent in the formation of Laws, from their root in the remotest antiquity down to perhaps the most important branch of their modern growth (see below, p. 28). That function is, to say the least, ignored or left out of sight in Austin's treatment; on the one hand by his dwelling so exclusively upon the element of Command in his account of Positive Law, on the other by his coupling indiscriminately together widely different psychological phenomena under the one head of Positive Morality.

The ordinary conception of what has just been spoken of as Right and Wrong in general, or, as it might be better put, of Rightness and Wrongness, involves, I think, some assumption of a common moral sense, at least in the modified degree referred to above (p. 9). Any such assumption is expressly deprecated by Austin, with whom Moral rules of conduct are merely regarded as sanctioned by Human opinion in a perfectly general sense, and are therefore classed indistinguishably with those of Fashion and Etiquette under the common head of Positive Morality (see § 2, p. 61; § 3, p. 94). Where the word Morality is used *alone*, as a term of praise, it indicates, in his view, such rules of Positive Morality as are in accordance with unrevealed Divine Law. It is as an alleged *index* to this Divine Law that the theoretical Moral Sense comes under consideration, together with other and, according to Austin, truer *indices*, in the 2nd, 3rd, and 4th of the first six lectures (see further on "Divine Law" and "Nature," § 2, pp. 51, 65).

While unable to agree entirely with Maine[31] as to the irrelevancy of these lectures to Austin's principal subject, I do not think they can be recommended to the commencing Law student of the present day, who might do better to accept either some such modified form of the Moral Sense as is adopted hereafter (§ 3, pp. 98—100), or some more modern version of the Utilitarian Theory of Morality.

In place, then, of this disquisition of Austin's I have ventured to interpose, between the general criticism of his definition of Positive Law and the detailed investigation of Modes and Forms, an attempted explanation of Morality in a somewhat wide form of its popular acceptance (to include Equity), as connected with Law. Some part of what is vaguely called Custom seemed to fall more naturally under this head than under that of Mode or Form: and the ambiguous use of Equity, as a method of Interpretation or pseudo-Interpretation, compels me to include the latter subject also in § 3.

Law and the State. The Austinian definition of Positive Law, as we shall see (§ 2, p. 67), includes or presumes that of a State or Political Society, with Sovereignty as an essential constituent. The subject is treated at great length in the 6th Lecture, as published; which, however, appears to represent four or five of the Lectures, as delivered. (Readers of this part of the book will find an Analysis given in the Table of Contents (pp. xviii, xix), particularly useful.)

Austin has here been blamed for a *preposterous*, or cart-before-horse, treatment of his subject, on the ground that a full consideration of Sovereignty ought to have preceded any attempt to define Law, which is, in his view, merely a creature of Sovereignty. His arrangement appears to me

[31] Early History of Institutions, ch. xii. pp. 366—370. On Austin's own view see Analysis of Lectures 1—6, pp. 84—86.

defensible on logical grounds (see § 2, p. 67), and the objection is not, in my point of view, very material.

The general subject of Austin's 6th Lecture is one of permanent importance, peculiarly deserving, and capable, of illustration by present instances. Hence the mere lapse of time will justify considerable criticism of his treatment, apart from fundamental objections due to his general conception of Law.

The definition of a State is borrowed by Austin from Bentham and amplified by some additions of his own. We have first to note the omission of "Legality" or, as it is better stated, of some administration of Justice, as an essential. Again, at all times, and more particularly in these days of written Constitutions, there is a good deal more to be said on the subject of Constitutional Law than comes under Austin's half-hearted admission of Constitutional Moralities, limited obviously by his somewhat exclusive consideration of the English system. Nor is the conception of Sovereignty, in its relation to Law and the making of Law, sufficiently analysed into its component elements to explain the special attention which each requires in Jurisprudence. On the other hand, Austin inflicts, or follows others in inflicting, on the student, what seems a very unnecessary difficulty, by coupling together, under the single word Sovereign, two perfectly different things—the external independence of a Political Society, as a whole, and the internal relation of a part of such Society to the remainder[32]. It results that much of the voluminous 6th Lecture is matter rather of International Law than of Jurisprudence, at any rate of an elementary treatment of that subject. Moreover, almost all the individual illustrations, given by Austin, of Federal States, Confederations, Half-Sovereign States, &c., should

[32] See below, § 4, pp. 152, 153: also P. J. pp. 173, 174.

certainly be re-written in the light of more recent history[33].

The main part therefore of my section on Law and the State will be matter of modern observation, drawn from literary sources much later than Austin. A second or supplemental section was devoted to a question of historical priority in somewhat remote antiquity, i.e. whether Law may not be or have been actually developed before any existence of Austinian Sovereignty in the Society under review. The question is one at any rate of interest in the present work, because such a developement seems not improbably to have been the actual case at Rome, as well as in various other ancient nationalities. But the idea of Law and the State growing together is of course not touched by Austin, whose treatment of the historical origin of States is pretty nearly confined to the demolition of a long exploded theory—that of the fundamental Civil Pact. And, on the whole, I have thought it better to remove this proposed supplemental section to a later volume (see above, p. 22).

Modes and Forms. The reasons for taking the matters discussed in the third part of Austin's Jurisprudence (Lectures 28—39) together with the first part, have been given above (p. 21). A considerable portion of his "Sources improperly so called" falls here as has been intimated (p. 22) under the heading "Morality and Law." I pass now to Modes and Forms in the strict and proper sense.

The subjects of the first three Lectures in this part of Austin's work (28—30), though mainly illustrated by the Roman Law, from which their titles come, are matter of direct modern interest and application. They are also, as has been said above, of far too primary importance to be

[33] E.g. in such works as Freeman's History of Federal Government; Bryce's American Commonwealth, i. chs. 27, 28, and his notes in the Appendix; Dicey's Law of the Constitution, &c.

separated from the definition or fundamental conception of Law.

I refer (1) to the true meaning of the distinction between *jus scriptum* and *jus non scriptum*, a subject here prefaced by a short disquisition on *jus* and *lex*; and (2) to the explanation of *jus moribus constitutum* and *jus a prudentibus compositum*, of their intimate connexion and partial identity. On all these points it is submitted that, under the light of later research and criticism, the views of Austin require considerable revision.

The same must be said with regard to his treatment; on the one hand, of the theoretical *jus gentium* and the *jus naturae*; on the other, of the practical *jus gentium* (what he calls "the *jus gentium* of the early Roman lawyers"), and its outcome, the *jus praetorium* (Lectures 31—35). The latter subject does, in fact, exemplify an important mode in the formation of *jus scriptum*, well illustrated by Roman legal history and not without its representation in modern (§ 6, pp. 338—340): but Austin's historical account is now much to seek both in fulness and accuracy.

The theoretical *jus gentium* may, for our present purpose, be identified with an equally theoretical *jus naturae*, from which its main alleged difference[34] is, for all the use made of it in Law, merely an academic point. (I am here leaving out of the question Ulpian's individual fancy on *jus naturae*, which is discussed below in § 2, p. 49).

With regard to the real influence of these theories on the developement or formation of actual Law, *natura* or *naturalis*

[34] War, and its result, slavery. See Ulpian, D. 1. 1. 4 and Gaius (Aur.), D. 41. 1. 5. 7. In the Institutes, however, Gaius says (2. 69): Ea quae ex hostibus capiuntur *naturali ratione* nostra fiunt. Of the institutions stated by Hermogenianus (D. 1. 1. 5) to be ex jure gentium introducta, the first three seem matter of *war*, the rest, dominia distincta &c. fairly deducible from ordinary human reason. More fully on the theoretical *jus gentium* and the *jus naturae* see P. J. pp. 358—363; also below, § 2, p. 51.

ratio can scarcely be considered apart from the ideas of *aequum* and *aequitas* in the true original sense of those words, which it is certainly not very easy to gather from the 33rd Lecture of Austin. To avoid the possibility of confusion, I may anticipate so far as to say that by "Equity," as here used, I mean a quality of administration or ground of judicial decision, which I should define as "the modification or supplement of existing Law by reference to current Morality." It is therefore here considered in the section (3) on Morality as connected with Law.

Equity, as meaning a particular system or body of legal rules, falls, so far as it may have had that meaning in Roman Law (see § 3, p. 106), under one head of *jus scriptum*—the Edict. In England, except where it may have been reduced to Court Rules now made statutory (see § 6, p. 340), it belongs in point of authority, however explicitly stated in text-books, to Case Law.

The last-named subject, together with that of the need which must inevitably suggest itself, of Codification or Digesting, occupies the greater part of Austin's Lectures 36—39. Case Law, in its strict and proper sense, finds, according to my view, but a slight and late representation in Roman Law (see § 6, p. 335), and is, in modern Jurisprudence, mainly a creature of English and American practice. Austin's Lectures upon it combine, in a somewhat confused fashion, two different subjects, (1) the grounds of judicial decision, (2) the operation of judicial decisions as precedents, i.e. as making new Law. Both require some brief notice, even in an elementary Jurisprudence, and in one mainly confined to Roman Law.

Under the grounds, for instance, of judicial decision, some more definite account must be taken, both in Roman and in English Law, of the Equity above referred to (p. 24 and below, § 3, pp. 106, 107), and of Current Morality generally, than is

to be found in Austin's occasional admissions of "Utility" as an object. Much of his writing, in these Lectures, upon the operation, in the way of Law Reform, of what he justly terms Spurious Interpretation (below, § 3, p. 115), is valuable: but it is so much confused by his wrong-headed explanation of *aequitas*, and other unnecessary difficulties, that the whole subject requires to be almost rewritten for the commencing student of Law[35].

The operation of judicial decisions generally, as precedents, is pretty definitely ascertained and settled in English Law, and the *rationale* of their application I suppose correctly stated by Austin—whether practically carried out in the scrupulous manner which he describes may be doubted[36]. Their recognition is partial and varied in the Roman and in most other systems. There, and even in England, it would seem to me that reference has often been, and will, as time goes on, more often be made to a Form of legal literature, which must, in spite of disclaimers, inevitably acquire some degree of authority—the Law, if I may venture to call it so, of the Text-book. That subject will be mainly treated here under the heading *Jus a prudentibus compositum* (§ 7).

The **Analysis of Pervading Notions** above referred to (p. 23) forms the second part of Austin's Lectures 12—27, the omitted numbers being accounted for by the fact that four or five are represented in the voluminous Lecture 6 of Campbell's larger Austin, while the Introductory matter printed at the end of that edition (above, p. 2) becomes Lecture 11 of the Student's.

The contents of Lectures 12—27 are classed, together with those of the preceding ones, under the head of Definitions, by the editor of Austin, no doubt in accordance with the original author's own view and plan, as indicated in the

[35] See generally P. J. pp. 230—246.

[36] Austin, Lectures 37 and 39, *passim*. Also P. J. pp. 248—251.

Introductory Essay, where he points out the impossibility of expounding the principles and distinctions common to all or at least to all more advanced systems of Law, without analysing into their simpler components the complex meanings attached to certain perpetually recurring terms, such as Right, Obligation, Injury, Sanction, Person, Thing, Act, Forbearance, &c.[37] By Right, Obligation and Injury are here, I may repeat, only intended *particular* or individual Rights, Duties and Wrongs, and of these only such as are *legally* enforced or recognised.

Almost all the matter in these Lectures is worth careful consideration, and the greater part may be logically classed under the head of Definitions. But with the exception of the general statements about Sanction in Lectures 22, 23 and 27, which must go with the definition of Law[38], I have not found that Austin's Pervading Notions *can* be so usefully taken, as the subject of Modes and Forms, at the first beginning of a course of legal study.

The definition, for instance, of particular legal Rights and Wrongs, with the correlative subject of Duties and the division of the latter into Absolute or Relative, might seem to claim, as fundamental ideas, the preliminary place given them by Austin. The distinction again of Rights as *in rem* or *in personam* might naturally follow, as of course, the definition of Rights generally. But, apart from the considerable amount of repetition resulting from the use of these same ideas and phrases in the later consideration of division of a Corpus Juris by subject-matter, there are some objections, in principle, to Austin's order of treatment. Many of the "notions" in question are by no means accepted as finally settled by Austin's fundamental basis of command. They derive their current signification, not altogether from the

[37] Austin[5], p. 1075; St. 11. 151.
[38] See below, pp. 77, 78.

revolt of popular sentiment, but partly also from their use in traditional classifications of Law. The signification for instance of Person and Thing, as legal terms, cannot be adequately considered *per se*, or otherwise than with reference to their actual use, in antithesis, by Gaius and Justinian or their modern followers. In my own experience, certainly, the subjects of Austin's Lectures 12—17 have generally proved not only hampering but unintelligible except in immediate connexion with his last group (40—57), to which I shall come presently.

Another large portion, moreover, of the Analysis of Pervading Notions—one which has been most severely criticised by later English writers—Lectures 18—27, deals with psychological questions of consciousness, entering into the subject of legal responsibility, which are specially, if not almost exclusively, connected with problems of modern Criminal Law. Nor, where the scope of these questions seems more general, must the arbitrary character of Austin's conceptions and phraseology be forgotten. "Intention," for instance, as used by him, is both wider in one sense and narrower in another than what is ordinarily understood by the word; while his "Negligence" is something perfectly different from the meaning of the term as interpreted by modern English decisions[39].

Purposes and Subjects. With the exception, then, of the Lectures on Sanction, which belong rather to the definition of Law in general, and of those last mentioned (which I should prefer either to omit altogether or to take in connexion with Criminal Law as a special subject), the second part of Austin's Lectures may be most usefully read together with the fourth, which occupies the final, and incomplete, portion of Campbell's edition; to which, moreover, most of

[39] See Clark, Analysis of Criminal Liability, p. 78; and Markby, Elements of Law[6], pp. 327—329.

the Fragments, especially the Tables and Notes, belong. This part of his work was styled by Austin "Law considered with reference to its *purposes*, and the subjects with which it is conversant." There does not seem to be much point in the first member of this phrase. The ultimate purpose of *all* Law would now, I suppose, be admitted by most people to be the same, i.e. General Utility; the proximate or immediate purpose is so inseparably connected with subject-matter that a consideration of the latter includes a consideration of the former. In fact, hardly any reference is made to these "purposes" by Austin himself, except to deprecate their use as a basis of distinction[40].

The matters actually treated in the fourth part of the work, and such of the second as should be read with it (above, p. 31), are certain principles and notions of a fundamental and permanently important character in systems of Law, upon which the subdivisions of a Corpus Juris have been mainly based in past experience. These last-named subdivisions are, I may repeat, the only ones which have any practical existence for the student who has passed from the *generalia* of Jurisprudence to deal with an actual body of Law. By him all the different kinds of Law must be taken as one aggregate, under the particular head of subject-matter, whether they come from direct statute or old custom or judicial decision.

It is in the arrangement or classification of these heads of subject-matter that we have to take into account the particular object with which the subdivisions, to which I am now referring, were employed. That object was, and is, primarily educational. Heads of subject-matter may, for the practitioner, or for the student who has already got some

[40] See Austin on the proposed distinction of Public and Private Law by Ultimate Purpose, 44, p. 753: also Lecture 45 as to any similar distinction between Primary and Sanctioning Rights and Duties.

general knowledge of the Law upon which he is engaged, be conveniently arranged, like Lord Halsbury's "Laws of England," in alphabetical order or, on what was probably the scheme of Justinian's Digest, by a rule of thumb classification according to practice in the Praetor's Court. But, for the beginner, some dividing up, on broad and simple principles, of matters which would otherwise be a chaos, was clearly desirable. Such a classification, for learners, was supplied, as to the most generally important part of Roman Law, by the Institutes of Gaius and Justinian, and, as to the whole of English Law, by the Commentaries of Blackstone. The same *desideratum* of "cognoscibility," as Austin phrases it, "by the laity" has in general been a much desired result, if not a primary object, of modern systems of Codification, framed as they mainly are upon the old Roman lines.

The last quarter of the larger edition of Austin consists of comments or criticisms upon the Roman and English Institutional schemes, and an unfinished attempt at a substitute. This is the part of his work which has, I think, been generally found among the least satisfactory for first year students (see above, pp. 15, 16); partly from its incompleteness, partly from its anticipation of much detail in English Law which, at any rate in the course of study marked out by our Cambridge Examinations, they could not be expected to know. In fact, for commencing students, I found it so difficult, in preparing a "Comment on Austin," to annotate this part of his work, with any prospect of utility, that although I had given a sort of engagement to treat of it (in my Introduction) I practically left it out altogether.

I have now endeavoured, in the latter part of the present work, to deal with the last quarter of Austin's, avoiding much of the English detail above referred to, treating the Institutional systems which he criticises as the main subject, and considering *his* views rather as matter of commentary

(see below, § 10 on Public and Private Law). To substitute Austin's lines of demarcation for those of Justinian and Blackstone, as was attempted in Hunter's Roman Law, or to intrude them into the Roman Institutional system itself, as was done in the earlier editions of Poste's Gaius, does not appear to me to have been a success. It is certainly rather bewildering to the student. I may here repeat (see above, p. 31) that a considerable part of the "Analysis of Pervading Notions" will be taken into account in the treatment of these final Lectures of Austin.

In connexion with this consideration of a concrete scheme or body of Law, divided into branches of subject-matter, as distinguished from abstract questions of origin, source, mode or form, I may here endeavour to deal with an argument often brought against the study, by a beginner in the legal curriculum, of Jurisprudence at all.

Necessity of a practical application. It must undoubtedly be allowed that definitions and axioms have *per se* an abstract and somewhat unmeaning character to the ordinary student, perhaps particularly so to the ordinary English student, in his present phase of somewhat absorbing physical, as compared with intellectual, activity. This natural unattractiveness of such a subject as Jurisprudence is not lessened by our present schemes of legal education for intending solicitors and barristers, in which we find that the one has no recognition of Jurisprudence *eo nomine* at all, while the other, though it began by giving special encouragement to that subject, has ended by leaving it comparatively little actual room in the entire course, and transferring honours and emoluments mainly to the study of practice. In the present examination scheme for admission to the Bar, Jurisprudence does not appear to be expressly recognised at all, though I gather that it is to some extent treated, in the official Lectures actually given, under the very useful and

interesting form of a comparison between the Roman Institutional Law and modern systems, in regard to the subsisting effect of the former upon the latter. In the education of intending solicitors by the Law Society, I do not understand that either Roman Law or Jurisprudence finds any official recognition.

While therefore it is true that many of the principles and notions claimed by Austin (above, p. 8), as essential to any coherent conception of a system of Law (including the definition of Law itself), are independently capable of a fairly simple statement, and of appeal to an ordinary amount of intelligence, they will have little interest or meaning to the majority of students, unless realised and illustrated throughout by reference to some actual system of Law in brief, whether past or present. This remark applies particularly, as has been indicated above, to these distinctions and definitions which enter into the division of such a system of Law by Subjects; their *raison d'être* being, indeed, scarcely apparent until we come to attempt that division.

Special connexion with Roman Law. The question from what system this vitalising interest in Jurisprudence is to be furnished would seem at first sight capable of only one answer. I should unhesitatingly say—from the students' own National Law—in the case of any candidate for the Ordinary Degree in a University, or for admission as soon as possible to ordinary practice, if indeed such candidates should take Jurisprudence at all (see above, p. 14).

By most writers, however, on this subject—as, in the main, by Austin—Jurisprudence has been hitherto rather connected, in particular, with Roman Law. Conversely, most editors of Roman Law, at least of the Institutes, have usually found it convenient, if not unavoidable, to premise, to their main work, some of the definitions and distinctions of Jurisprudence; the comparatively simple propositions required

for this purpose being sometimes unduly complicated, in later English works, by introduction of the peculiar terminology and dogmas of Austin and his school.

It is not my business here to shew cause for the retention of Roman Law generally as an obligatory subject in any Honour course of legal education, and as a permissive or alternative subject in the study for certain special branches even of ordinary practice. Assuming that it *is* to be retained, I wish to point out what appear to be the advantages of connecting it particularly with Jurisprudence.

In that part of Roman Law with which Jurisprudence has been and will no doubt continue to be mainly connected —the Private or "Civil" branch (see below, § 7, p. 365)—the Institutes naturally take the foremost educational place. With them is, or always should be, associated the more general parts (Titles 1—8) of the first Book of the Digest, among the most important of which are the main historical statements from the Enchiridium of Pomponius (Digest 1. 2. 2). These last, coupled with the cognate passages in Justinian's Institutes—and perhaps still more with those in Gaius—furnish among the best and clearest examples, that we have, of the modes in which Law has historically been made. But the chief value of the Roman Institutes, as connected with introductory Jurisprudence, lies in the fact that most of the fundamental ideas above referred to (p. 30), though often rather implicitly than directly defined, are assumed and employed as the basis to a classification or subdivision of Roman Law for *educational* purposes. This classification has been sometimes represented as the mere fancy of one mind (Gaius'), and owing its preference to the accidental favour of Justinian's compilers, who, however, follow a lead of Theodosius and Valentinian. I am more disposed to regard the Institutional system that has come down to us as, if not the common result of a gradual developement in

professional training, at least a happily thought-out scheme which satisfactorily met the demand for such training. The arrangement is no doubt scientific, artificial—if you will, academic: but it was obviously framed by a professional man, being moreover coordinated with another work, on parallel lines, meant for direct use in daily practice (Gaius' *Res cottidianae*).

It would, again, be passing beyond my present limits to do more than refer to the amount in which the scheme of the Institutes has entered into foreign bodies of Law, the extent to which it has dominated and marshalled legal literature throughout the Western world, and the fact that some of its main features were adopted by our own Blackstone in the first successful attempt made at a comprehensive view of English Law.

It is true that the map or plan of the ground before him here recommended to the commencing Honour student may include some obsolete tracks and byways, to which a perplexing and mischievous importance has been given by their handiness for examination purposes[41]; true also that in some really important lines it differs, as he will find, from that which he must come afterwards to consider in his own national Law. It is, however, submitted that, with a little reasonable comment or explanation, the fundamental ideas or, to keep the metaphor of a map, the main lines and routes, can be easily discerned and advantageously followed, in a study of the Roman Institutional system to begin with, supplemented by a very broad and general comparison of modern Codal or Educational arrangements. Such a comparison must certainly do the intelligent student one service in calling his attention to the distinctions and divisions which are *common* to different systems, and which will thus

[41] E.g. "What is an *orcinus*?" and the like, of which I fear I could find plenty of instances, in examination papers by myself and others.

be recognised as probably essential and universal, in contrast with others obviously national, accidental, and perhaps therefore only temporary. I may, in illustration of my meaning, anticipate so far as to contrast *our* present division of Property Law into Real and Personal, which might appear to the purely English practitioner something like a Law of Nature, with Austin's more "pervading" distinction of Right generally as *in rem* or *in personam*, or with the one, which I should prefer to instance, of Proprietary Rights, as of Ownership or of Obligation.

I am not, of course, speaking now of that more detailed comparison between modern systems of Law, which is for the advanced student in Jurisprudence, and pertains to the ultimate bearing of that study on Principles of Legislation (see above, p. 15), but does not belong to its preliminary or elementary employment. The particular branch of Jurisprudence which has been last referred to—the subdivision of a Corpus Juris by subject-matter—has been, in fact, so much complicated, in Austin's treatment, by a mixture of ancient illustrations with modern technicalities, and suggested improvements of his own, as to render it comparatively unfit for use at the outset of legal study. This part of his work has accordingly furnished, as it stands, one of the strongest reasons for the postponement of Jurisprudence altogether, in my opinion wrongly, to an advanced period in such study.

I cannot, I fear, claim to have entirely avoided the same faults. But in view of the particular educational value of elementary Jurisprudence as connected with Roman Law, and of the possibility of this work being used, at least *ad interim*, as a Manual for the study, in that connexion, it seemed unavoidable to enter somewhat into the subdivision of a body of Law, mainly on Roman lines, by individual subjects. And this course as unavoidably led to a comparison with the broader divisions of our English Institutes and

of some modern systems of Codification. No little encouragement has been given me, in this particular part of my task, by the evidence of demand and utility furnished in the Digest of English Law now appearing, which is framed on the lines of the latest modern attempt at Codification.

The connexion of Jurisprudence with Roman Law, and more particularly with the Institutional scheme, has, for the International Jurist—and for the home Reformer who is not above taking a lesson from foreign experience—another advantage which has been hinted at above (p. 13). The *common phraseology*, which is an obvious *desideratum* for any wide or cosmopolitan point of view, has been already to a considerable extent furnished by the Roman Law, just as the Roman language once furnished a common medium of learned communication. As much might be lost to the juristic world by neglect of this old *lingua franca* of the Institutes and the Digest, as to the scientific world by discontinuing the study of the old classical languages.

§ 2. DEFINITION OF POSITIVE LAW

Conscious and unconscious definitions, pp. 40, 41. Justinian and Ulpian 1. 42—45. Blackstone, 46. Austin, 46, 47. Law as confined to human conduct, 48—51. Law as Rule: Generality, 52—56; Law? as Command, 57, 58. Hobbes, 59. Austin's Law properly so-called: Right, Wrong, and Duty, ib. Determinate Source, ib. Law improperly so called, 60, 61. New possibilities of corporate action and formulation, 62—64. Positive as generally = Human Law, 64. Natural and Positive as subdivisions of Human Law, 65, 66. Austin's Positive Law = Law strictly so-called, 67, 68. Post-Austinian use of "Positive," 69. Autonomic laws, 70. Laws of a club or game, 71. General criticism of Austin, 72. Imperative character and application of Law, 73—75. Sanctions, 76—78. "Imperfect" laws, 79, 80. Signified command-Admissions, 81. Objections: (1) Disagreement with *origin* of Law, 82, 83; (2) Inadequate description of non-statutory Law, 84, 85; (3) Exclusion of Constitutional and International Law, 85, 86; (4) Austin's "Positive Morality," 86. Clubs and political associations, 87—89. Conclusion, 90—92.

Conscious and unconscious definitions. The work by the present author referred to above (§ 1, p. 17) contained *inter alia* an etymological investigation of some early names for Law in languages belonging to the Aryan or Indo-European group as constituting what were there called *unconscious definitions*[1]. The results were relied upon as at least negativing, so far as they go, the principal point in Austin's definition of Law and account of Right and Wrong (see below, p. 59). They bear mainly on the origins or nascent stages of Law, and will be noted hereafter under

[1] P. J. pp. 77, 90, &c.

the head of "*Jus* and *Lex*." I have at present to deal with some of the *conscious* attempts made by this or that juristic authority to state the essential points of what was understood by *Jus, Law*, &c., in his own time. A fairly exhaustive collection of them will be found in Professor Holland's 4th chapter and in my Practical Jurisprudence, part i. chs. 8. and 9.

Most of the older definitions in question are of little real use for any educational purpose. They often merely express, as indeed do many modern ones, some political theory or philosophical ideal rather than an actual state of things. Much the same objection applies to the definitions in which the ultimate *objects* or *ends* of Law play a principal part. In times past these, even where not obviously ideal, have varied too much for us to draw any useful generalisation from them. In most modern states, at least such as we call civilised, the professed object of all Law would probably be the well-being of the community at large; but this, being a commonplace or matter of course, is not of much use towards definition[2].

Hence we do not find that the practical jurists, who confine themselves to generalisations from actual subject-matter, deal so much with the object or end of Law as with its scope, character and "juridical source" (see above, p. 20). Hobbes, in the 26th chapter of the Leviathan, where he professes to shew "not what is Law here or there, but what is Law" may be taken as, if not the founder, at least one of the earliest and best representatives of this school. Upon the above-mentioned chapter are, I think, really based the two slightly varying definitions of Law which will be considered presently—one, not so well known now as heretofore, by Blackstone, the other that of Austin. The latter is the main subject of the present section: but I may first be

[2] See P. J. p. 189 and cf. Austin[5], 17. 402, &c., on the indistinguishability of Duties by their *ultimate end*. Also above, p. 32.

allowed to call attention to certain well-known definitions or axioms from the last and greatest of the Roman jurists, which, apart from their traditional claim to respect, are not without real importance to my own point of view, as bearing on the connexion between Law and Morality. They are to be found in the title De Justitia et Jure, prefaced by Justinian to the opening sentences of Gaius' earlier Institutes.

Justinian Instt. 1. tit. 1. The Regulae and Institutiones of Ulpian furnish the most important part of this Preface. It is a strange farrago, pieced together out of two passages from the beginning of the above works and an interposed paragraph on legal education, in excellent good sense but in the unmistakeable style of Justinian's own compilers, with which we need not at present trouble ourselves. The quotations we know in their original form and order from Justinian's Digest.

"Justice," according to Ulpian, "is the constant and continuous will of rendering to every man his *jus*, i.e. right[3]." The ideas of constancy and continuity no doubt aptly describe a *habit* or *condition* of mind[4]; but they come oddly in the above sentence and it is not impossible that the words may have been suggested by one of those fanciful derivations which have deluded the wisest jurists from Ulpian to Coke[5].

The sentiment that Justice consists in rendering to every man his right appears originally in the form of paying each his due as a *debt*, and in that form is attributed to the Greek poet Simonides of 500 B.C. It is quoted and discussed by

[3] Justitia est constans et perpetua voluntas jus suum cuique tribuendi, Just. 1. 1. pr. compared with Dig. 1. 1. 10. pr.

[4] *ἕξις, διάθεσις.* On preference, by the Stoics, of the latter idea as = fundamental or constitutional condition, see Schol. in Aristot. Bekker, vol. iv. p. 70.

[5] *Jus-sta-tri-* seems certainly fanciful enough, if meant. Cf. however *testamentum = contestatio mentis*, Ulpian, 20. 1, &c. For the true etymology see below, n. 16.

Plato in the beginning of his great work on the Republic, which is throughout an attempt to define Justice[6]. In the Stoic division of the four Cardinal Virtues, perhaps originating with Cicero's teacher Posidonius, the function is assigned to Justice of distributing to each that of which he is worthy[7]. So in the Auctor ad Herennium, from whom Cicero has borrowed so much, Justice is the Equity which renders to every man *jus* (i.e. Right) according to his worth, while with Cicero himself *suum cuique tribuere* is the continual attribute of this virtue[8].

It is not my intention here to discuss the true meaning of *aequitas*, which will be specially treated under the head of "Morality and Law": enough is said to trace the juristic genealogy of Justice as a *moral* quality, and to prepare us for *Jus* = Law as based on the *moral* idea of Right, or as resulting from the exercise of that moral quality, Justice.

In his next two sentences, which are somewhat illogically transposed in Justinian's Institutes, Ulpian passes from the *jus* of an individual to *Jus* in general, or in the abstract. "The precepts of *Jus* are to live reputably, not to injure another, to render to everyone his own[9]." There is a strange semi-Christian ring about these three famous maxims, and some points of tone and expression may possibly be due to that new religion to which Ulpian's patron is reputed to

[6] *τὰ ὀφειλόμενα ἑκάστῳ ἀποδιδόναι*, Plato, Rep. i. p. 331 E.

[7] See Diogenes Laertius, 7. 92 *τέτταρας δὲ οἱ περὶ Ποσειδώνιον...* and Stobaeus, Ecl. ii. p. 102 *δικαιοσύνην δ' ἐπιστήμην ἀπονεμητικὴν τῆς ἀξίας ἑκάστῳ.*

[8] Auctor ad Herenn. 3. 2. 3 Justitia est aequitas, jus unicuique tribuens pro dignitate cujusque. See Cicero, de Natura Deorum, 3. 15. 38; de Finibus, 5. 23. 67, &c. Further on Cicero's Jus gentium or naturae, and his connexion with Posidonius see P. J. pp. 357, 358.

[9] Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere Just. 1. 1. 3: Dig. 1. 1. 10. 1. *Pace* most previous translators, I cannot accept *honestly* as a fair rendering of the untranslateable *honeste* (Theophilus has *Καλῶς*). I suggest *reputably* as better, though not adequate, see P. J. p. 118, n. 10.

have paid a fractional respect[10]; though most of their substance can be traced to times before our era. In any case they are, as Savigny well says[11], no rules of Law in the ordinary sense, but moral precepts in which rules of Law find their foundation. If the *Jus* to which they belong is to be termed Law at all, it is Law in the widest and most ultra-philosophic sense of a Law of Universal Nature so that "a skill in this Law is an acquaintance at once with things divine and human, being a knowledge of the just and the unjust[12]." For it is thus, by reference to Justice as something divine, rather than by any special allusion to the *jus pontificium*, that we surely must explain the strange sentence which closes the quotation from Ulpian's Regulae in the Digest, but is put more to the front in that of Justinian's Institutes.

The same idea is further developed in another Digest quotation from Ulpian's Institutiones (to which reference has been made above, § 1, p. 3), though only a later part of the passage is adopted in the Institutes. "He who would study *jus*," Ulpian tells his students, "should first know whence its name is derived. *Jus* is so called from Justice, for *jus* is, as Celsus neatly defines it, the Art (? = practical application) of what is good and equitable. Of which Justice we (*Jurisprudentes*) may deservedly be called Priests; for what we worship is Justice and what we profess (to teach) is acquaintance with what is good and equitable...herein claiming a 'philosophy' real not feigned[13]."

[10] Lampridius, Vita Alex. Sev. 29 Animas sanctiores in quis...Christum, Abraham et Orfeum et hujuscemodi ceteros habebat &c.

[11] System, ii. § 59, p. 408.

[12] Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia, Just. 1. 1. 1; Dig. 1. 1. 10. 2. In Deo Auctore (de Conceptione Digestorum), § 1. "legum auctoritas quae et divinas et humanas res bene disponit," *leges* seems to be equivalent to *jus* in this exalted sense.

[13] Dig. 1. 1. 1. pr. 1, Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut ele-

Passages such as these, treated at least with respect by men so great as Savigny, are dismissed with contempt by Austin in the long note to Lecture 6[14]. They do not appear to me to compare unfavourably with such a mass of strange statements as those in his own Lectures on *just* and *justice*[15]. I am not, however, concerned to defend each dictum as a link of logical reasoning, nor can I deny a somewhat circular derivation of *jus* from Justice, which itself consists in the will to render *jus*[16]. All that I wish to insist on here is the obvious interdependence, in the minds of Ulpian and his school, of Law and Morality in the ordinary sense of the latter word. With them the name for Law is the name for Right in general, as also for a particular right; and both meanings, together with the cognate conception of Justice, are referred to the moral idea of goodness and fairness or equitableness. As to the meaning of *aequum* in these and hundreds of other passages there is, as I shall shew hereafter, not the slightest doubt. Austin's attempts to explain that meaning as a "secondary" one[17] are wrong both in history and etymology: they form, in fact, a good instance of the circuitous methods to which members of his school are driven by their objection to recognise moral significations of words as early or original.

ganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.

[14] Austin[5], p. 217; St. 75.

[15] See Austin[5], 18. 409; St. 198, and generally the references (to ed. 3) collected in P. J. p. 26, n. 37.

[16] As a matter of etymology *justitia* is derived from *justus*, the termination being merely a suffix, and *justus* from *jus*. It is certainly *not* that which is *commanded*. See P. J. pp. 26, 27. For the original meaning of *jus* see below, § 5.

[17] E.g. Austin[5], 33. 576, 577; St. 293.

Such is the only definition, if definition it can be called, of Law, given by Justinian. For the enumeration, and the distinctions, of different *kinds* of Law, which he proceeds to discuss, although their consideration involves much which, as I have above pointed out (§ 1, p. 27), cannot be entirely separated from a definition of Law, are not the definition itself. Such enumerations of particulars will often be found doing duty for a statement of the general or common idea. The question "what is A?" is always more easily, and sometimes of necessity, answered merely by saying "A consists of B, C, D, &c.": and the work of definition is not so satisfactory that he who attempts it can afford to throw a stone at this simpler method (see end of section).

Blackstone. The following passages are taken from the Introduction to Blackstone's Commentaries, which deserves to be better known than merely (as our young people know the English classics through their parodies) by the notes, mainly sarcastic, of Bentham and Austin. "Law in its general signification is a rule of action,...whether animate or inanimate, rational or irrational, prescribed by some superior and which the inferior is bound to obey...but laws in their more confined sense, in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct." "Municipal law" (or the law of a particular state) "is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong[18]."

I shall have occasion farther on to comment on this definition in detail compared with that which is much more explicitly stated, and more logically adhered to, by Austin.

Austin. As before in defining Jurisprudence (§ 1, p. 3),

[18] Blackstone, Int. § 2, pp. 39, 44, 45 (original paging, given in margin of Chitty's edition).

I find it here most convenient to follow in general the main points of Austin's account of law, as falling within the province of Jurisprudence, i.e. as "*positive.*" However we may differ from him, we must fairly admit that these points are clearly put, capable of obvious illustration by any regular system of Law, ancient or modern, and eminently suggestive to the thoughtful student. I propose to take those first in which Austin's theory does appear to state ascertained facts or generally admitted conceptions, and secondly those in which it has been considered not truly, or at least not adequately, to describe the actual thing that ordinary people would understand by Law or "*the* Law," and corresponding words in other languages. The former, the agreed points, relate to subject-matter and scope—the *limitation* of Law to *human conduct* and to *rules* of *general application.* The latter are questions as to the *imperative* character of Law, with especial reference to its alleged *signification or command* by a *determinate* author.

In Austin's view briefly stated: Law, *properly so called,* consists, in its most general and comprehensive acceptation, of rules laid down, for the guidance of intelligent beings, by some other intelligent being or beings having power over the former. The addition of the term *positive,* in the sense in which it is used by Austin, confines these rules to such as are *set by men to men.* The combination Positive Law, as used by him, has also been stated always to imply that the rules in question are set by men *as politically superior,* or Sovereign, to men *as politically subject.* But such rules are more specifically designated by Austin—Law *strictly so called*[19].

Austin's definition of Law involves, it will be seen, that

[19] See below, p. 67. I defer to Prof. Brown's criticism (Austinian Theory of Law, p. 34) of my summary on p. 136 of P. J. I still think my reading of Austin might be maintained, but the point is scarcely worth arguing.

of a State or Political Society, which occupies the greater part of his important 6th Lecture. On this subject and the proper order of its treatment I may for the present simply refer to what has been said above (p. 24), and pass to the details of the definition here briefly outlined, taking first the points which may be admitted without difficulty.

Law as confined to human conduct. The Law with which modern Jurisprudence deals—Law in the "proper" sense of Austin and in the "more confined" sense alone considered by Blackstone, is limited to "rules of human conduct[20]." Its subject-matter is the action of *men* as distinguished on the one hand from the instinctive or semi-rational behaviour of the "lower" animals, on the other from the order or invariable sequence observed in inanimate matter, or predicated of impersonal abstractions—such as the "laws" of motion and gravity, of harmony or political economy.

Professors Holland and Brown[21] add that law only deals with *external* human action, not with thoughts or states of the will, except so far as manifested in action or willed inaction. I think that this might be understood, without statement, in the words *action* or *conduct*. Thoughts, or rather feelings and motives, do come under consideration in the question of Morality as a basis of Law, but are not within the subject-matter of Law itself.

If we took as standard the ordinary understanding of the majority of people (see below, p. 52), I think it would be accepted without discussion that the application of the word Law and its foreign equivalent to the latter of the above-mentioned cases is metaphorical, figurative or analogical—generally, as Austin terms it, *improper*. At the risk,

[20] Blackstone, l.c.; Austin[5], 1. 88; 5. 206—211; St. 77—80.
[21] Holland[10], p. 25; Brown, pp. 345, 346.

however, of being tedious, I must endeavour to point out what appear to be the specific points of difference—the more so as the well-known passage of Ulpian, that "most foolish conceit," so contemptuously discarded by Austin, contains matter worthy of a little more notice than was given it either by him or in my own previous discussion of this subject[22].

The reason for excluding the "laws" of inanimate matter or impersonal abstractions is plain enough. They doubtless represent an order or uniformity similar to that produced among human beings by Law properly so called. But conformity to them, if conformity it can be called, is, or is believed to be, a matter of necessary consequence, whereas the obedience to Law is universally understood to be a matter of voluntary conduct or at least acquiescence. Here then we take leave of Hooker's majestic personification and, in the main, of the Duke of Argyll's Reign of Law[23].

The same obvious distinction, however, cannot be at once drawn between uniformities of human conduct which obtain also among other animals. Certain of these uniformities are, as we know, attributed by Ulpian to a general Law of Nature whence he says is derived "the union of male and female, *which we call matrimony*, the procreation and *bringing up* of children. For we see that the other animals, even wild beasts, are rated by their skill in this law[24]."

A human instinct similar to that of other animals, in the matters above referred to, is admitted by Austin as among the "causes of laws," which are always to be clearly distinguished from the laws themselves[25]. In some other cases I hope to shew that what Austin will only recognise as a cause of law approximates too nearly to actual law to

[22] P. J. pp. 109—111.

[23] See the quotation and treatment of Hooker, Eccl. Pol. p. 8 in Austin[5], 5. 211.

[24] Ulp. Dig. 1. 1. 1. 3; Just. 1. 2. pr. (omitting the "even wild beasts").

[25] Austin[5], 5. 209.

be capable of real distinction. In this, the connexion is certainly remote. Granting that the temporary care of their offspring by animals has some resemblance to the bringing up of children by civilised races, while savages have often made little advance upon the affection of the brute, one must admit that it is a far cry from Ulpian's bare *conjunctio maris atque feminae* to anything which he could have understood by *matrimonium*.

This "remoteness of cause" together with the presumed absence or limitation of intelligence in "lower" animals[26], might be held sufficient justification for leaving the "conceit peculiar to Ulpian" at once out of the present question. I venture, however, to add a few words, partly because of Savigny's defence of Ulpian, partly because there are special cases, other than those cited by the Roman jurist, of animal instinct, possibly illustrative of the foundations of human Morality, to which I attribute great part in the origin of Ancient Law.

Savigny[27] speaks of the courses of action, alleged by Ulpian to be common to the lower animals with ourselves, as natural relations without which the human race could have no permanent existence. In his next statement—that Ulpian only attributes the *material* of Right (= Law) to beasts, not Right itself—it is not quite clear whether he means by the "material" a permanent living race, or an elementary family connexion. I take him on the whole to mean just so much union of the sexes and subsequent care of offspring as will suffice to maintain the individual species. Such courses of action are followed, according to Professor Holland, "in pursuance of a blind instinct resembling the forces which sway the inanimate world[28]." The parallel does

[26] Austin[5], 5. 207, n.; St. 77.
[27] Savigny, System, i. p. 416, cited by Brown, p. 91.
[28] Holland[9], p. 33.

not quite hold. Purely instinctive action would, I suppose, be correctly described as action without any conscious motive or proposed end beyond the desire or propensity to perform the action itself. It is not absolutely involuntary like the fall of the stone under gravitation. According to Maeterlink and similar observers, neither the devices of the *plant* to reach light and water, nor its modifications to secure successful reproduction are involuntary. But some *ulterior motive* must be postulated, beyond the fundamental instincts of individual self-preservation and reproduction, before we can recognise the "materials" of Right or Law: whether by materials we mean the creatures which may be capable of conceiving the idea of Right, or the feelings which may lead to its conception. Such a motive is perhaps to be found in desire for the preservation and well-being of the *race, tribe* or *body*, amounting to a higher order of instinct—the *social* or *political*, which appears to be shared by certain particular races of animals in common with man. And in this social instinct is not unreasonably considered, by some philosophers, to lie the basis of human Morality (see below, § 3, p. 99), on which, in my view, rests the beginning of Law. With this partial admission of Nature as a remote source of Law, we may drop Ulpian's "Law taught by Nature to all animals."

The addition of the words *etiam feras* (omitted by Justinian's compilers), in the above passage, shew that its author, while he apparently admits some variation of *degree* in animals with regard to their "skill" in this Natural Law (*censeri...peritia*), excludes any reference of it to *domestication*, which of course is not Nature's teaching. So, the case of the tamed animal, who can undoubtedly be taught both to understand and obey his master, is laid aside by Austin as irrelevant or of little importance[29]. Without venturing

[29] Austin, as cited in n. 26.

to say quite so much of the dictum of Ulpian, backed moreover by Savigny, I shall now leave this subject with the words written on it in my previous book. In popular parlance and conception with which, after all, a Jurisprudence of any reality has largely to do, there has never been any question of extending the name or thought of *Law* to the case of the "lower" animals.

Law as Rule. Generality. In defining Law as a Rule, Blackstone, with whom Austin is in this respect agreed, takes the word Rule to be significant not only of *generality* but of *imperative character*[30]. The former is perhaps the more obvious property in the ordinary acceptation of the word: at any rate the two are distinct and should be treated separately.

There are two aspects of the generality of Law; which may be conveniently distinguished as generality of object or application and generality of incumbency. According to Austin[31] it is an essential character of Law or Rule that it has in view acts or forbearances *of a class*, i.e. not specifically or individually determined; but, as regards its *incumbency* it may oblige or constrain either a *class* of persons or an *individual* person. The former fact is certainly an essential feature of all rules whether laws or not, and is, of course, directly connected with the *general form* of which I shall have a good deal to say hereafter. The expression "class of actions, &c." is not a very satisfactory one, as will be seen by the various suggested *tests* of this kind of generality in Professor Brown's interesting note on his § 60 (pp. 17, 18). Perhaps the statement that a Rule deals with occasions *capable of indefinite recurrence* might meet some of the difficulties which have been felt. It is not essential that the space of time, or period, during which the occasions may recur, should also be indefinite as

[30] Blackstone, i. pp. 44, 45.

[31] Austin[5], 1. 92, 93; St. 14.

suggested by M. Esmein (Brown, l.c.). "If Parliament," says Austin with perfect correctness, "prohibited simply the exportation of corn *either for a given period* or indefinitely, it would establish a Law or Rule...but an order stopping the exportation of corn then shipped and in port would not be a Law or Rule[32]." The expression *lex annua* (= *year's* law, not *annual* law), sometimes applied to the Praetor's Edict, is a good instance of Austin's generality of object during a limited period, a fact otherwise expressed by the Edict being said to be *perpetuum*, a *standing* order, though originally only good for the magistrate's year of office[33].

I may add, to meet a possible difficulty, that the occasions dealt with by a *retrospective* Act, although they may be *described* generally and properly styled a *class*, are yet in reality, as portions and parcels of the immutable past, *specifically* determined or limited, and the Act is an occasional or particular command[34].

Blackstone, on the other hand, though he certainly appears to me to recognise Austin's generality of *object* (which is not admitted in that author's criticism of him), does undoubtedly lay more stress upon the general *incumbency* of Law, i.e. its obligation upon *persons of a class*[35]. This part, however, of his definition, though it in terms includes, as it ought to do, *both* the generalities in question, is a little weakened by the author's having combined, with the idea of sovereign command (which he and Austin get from Hobbes), the different point of view and illustrations of the Roman jurist Capito (see below, p. 55).

[32] Austin[5], 1. 93.

[33] See below, § 6, p. 339.

[34] This point was suggested to me by M. Duguit's contention (see Brown, p. 19), based upon the French Exiling Act of 1886, although the specific determination in that case was one of *persons*, not of actions.

[35] See Austin[5], 1. 94, 95. In Blackstone (Int. § 2, p. 44) note his words *transient* and *permanent*: "It is a rule; not a transient sudden order from a superior to or concerning a particular person, but something permanent, uniform and universal, &c."

If I may refer here, as I shall have to do more than once hereafter, to the *ordinary use of words*, as admissible evidence on a matter which must depend a good deal, at least in modern times, upon popular conceptions and estimates, I would urge that this *generality of incumbency* is implied or understood, as a matter of course, in any rule to which we should give the name of Law. Many of the puzzles which Austin's rigorous definitions suggest to the lecturer or examiner, and, on the other hand, many of the paradoxes to which they can easily be carried by an adroit critic, may be swept away by the test of practical unimportance, which Austin's own good sense occasionally applies to the creatures of his own logic[36]. No one, I think, would use the term Law, intensified by a capital or a definite article, of any rules which did not obtain generally among a considerable number of individuals, whether we can exactly regard them as a *class* or not.

These remarks apply conspicuously to one set of Austin's instances, in which a command "obliging exclusively persons individually determined may amount, notwithstanding, to a *law* or rule." The cases to which I refer are those of *domestic relation*, as of father and child, guardian and ward, master and slave[37]. The "laws" here are, it will be observed, set *by private persons*, and, for that reason, are placed by Austin in an exceptional class of "positive moral rules which are laws proper." They come below (p. 70) under the head of "*autonomic* laws."

A more important instance is that of "law" set, in this case also, *to* a determinate person, but *by* a *political* authority. The case alleged is that of Parliament creating and granting a new office, where the "law," which binds the grantee to services of a given description, is, in Austin's words, "exclusively binding on a specified or determinate person[38]."

[36] See below, p. 68. [37] Austin[5], 1. 95. [38] Austin[5], 1. 96; St. 16.

Here, however, unless we suppose the so-called office to begin and end with the individual, he is, in truth, *generically* not specifically determined, e.g. as the Viceroy of a new Province, the Head of a new Board: and, in any case, a general obligation is laid *on the community* to facilitate or at least not obstruct the discharge of the new officer's duties. But I do not rely upon this last ground, on which it has indeed been contended that *any* isolated orders or decrees of State might be called *general*, as being practically addressed to all its members, those who are to carry it out and those who are to suffer its being carried out. The primary difference, as to *object*, between an isolated order and a general rule remains, and the fact, that neither of the two tests of generality in a Law is sufficient without the other, is no reason for rejecting both, which is the object of Sheldon Amos' contention with regard to those mentioned above[39].

I have been the more obliged to enter rather at length into these points, raised, it may seem, somewhat gratuitously by Austin, on the generality of Law, because of their connexion with the Roman *privilegium*, to which he refers, and with the definition of *lex* as *generale jussum* by Ateius Capito. The meaning of this *generalitas*, according to Aulus Gellius, our authority for Capito's definition, is the *bearing* of the question (*rogatio*), put to the *populus* or *plebs*, *upon the case* of all citizens, which Gellius proceeds to illustrate by the antithesis of *privilegia*[40]. Under the latter head he gives instances of so-called *leges* with reference to specific individuals, both in the unfavourable or "odious" sense which the word *privilegium* appears to have mainly borne down to the time of Cicero[41], and in the favourable

[39] Brown, p. 18. See his own correct conclusion, § 630, p. 345.

[40] A. G. 10. 20. For text and fuller consideration see below, § 6, p. 320.

[41] See Cicero, pro Domo, &c. *passim*, and Greenidge's Legal Procedure, p. 313 (a).

which it almost exclusively bears with the jurists of the Empire[42] as with ourselves. The generality, then, of a *lex* as opposed to a *privilegium*, which is intended by Capito, at least as explained by Gellius, is *application to*, rather than *incumbency on* all citizens[43]. But it may be easily seen that general incumbency also must certainly be understood or implied both in a *lex* and a *privilegium*[44]. As to the latter, Austin shews that a *favourable* one necessarily involves an obligation upon other citizens generally to respect the favoured individual's special rights; while a similar obligation in the case of an "odious" *privilegium*—to facilitate or not obstruct the individual's special disability or penalty —though not at first sight so obvious is equally true[45].

Blackstone's words "*to or concerning*" a particular person (above, n. 35) imply *e converso*, in the case of Law, merely the generalities of incumbency and application: his instances indeed (to confiscate the goods of Titius or to attaint him of high treason) only refer to the latter. But his "*permanence*" clearly indicates a standing order (Austin's "obligation to actions of a class"), as distinguished from a particular command.

I need not perhaps add that the above idea of generality of *application* is quite compatible with the recognition of *different classes* of persons, with varying rights and obligations, in the same state: such variation being however

[42] See Dirksen's Lexicon, s.v.

[43] So Ulpian says, of *Jura*, legal rules or principles generally: non in singulas personas sed generaliter constituuntur, Dig. 1. 3. 8.

[44] For actual *expression* of general *incumbency* as to *lex*, see Julian's reasoning that both *leges* and *consuetudines*, being generally accepted, *tenebunt omnes* (Dig. 1. 3. 32. 1). Cf. Marcianus, Dig. 1. 3. 2. πᾶς ἐστιν νόμος...πόλεως συνθήκη κοινὴ καθ' ἣν ἅπασι προσήκει ζῆν τοῖς ἐν τῇ πόλει.

[45] Austin[5], 1. 96, n.; 28. 519; St. 16. A good illustration may be found in the *interdictio aqua et igni*, whether as the carrying out of a sentence, or as a *privilegium* proper. See the sentence on Q. Metellus (Cicero, pro Domo, 31. 82) as given by Appian, B. C. 1. 31. τοὺς ὑπάτους ἐπικηρῦξαι προσετίθεσαν μηδένα Μετέλλῳ κοινωνεῖν πυρὸς ἢ ὕδατος ἢ στέγης κ.τ.λ.

recognised by the common Law of the body to which these different classes belong[46].

Law as Command. So far the terms of our definition of Law are scarcely contested points: they require little more than definite statement. We are on more debatable ground when we come to the second characteristic attributed to Law, as being a Rule, both by Blackstone and Austin, viz. that it necessarily implies *external command.*

"Law," Blackstone writes, "is called a *rule* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not as we see proper...which is matter of persuasion whereas Law is matter of injunction—and also to distinguish it from a *compact* or *agreement,* for a compact is a promise proceeding *from* us, whereas Law is a command directed *to* us[47]."

Blackstone, then, adopts in principle the same view as that more explicitly stated (see below, p. 59) by Austin, of *signified external command* as essential to Law, both here and in his further account of the Law of a particular State. The difficulties and questions of *actual notification* to those who are to obey the Law will be considered hereafter. At present I have to note certain qualifications in the doctrine of Law as dependent on command, particularly in the following passage of Blackstone, which raises an important difference between him and Austin or Austin's original, Hobbes. For both the definitions to which I am now referring are evidently suggested by two short paragraphs from the famous xxvith chapter of the Leviathan.

"Municipal or Civil Law"[48] is, according to Blackstone,

[46] E.g. the Rectitudines singularum personarum of Anglo-Saxon Law, where the *personae* do not mean individuals, but classes; and the increasing tyranny of *differential* taxation in our own times.

[47] Blackstone, Int. § 2, p. 44.

[48] Both expressions mean the law generally of a particular state. For the explanation of "Civil" see below, § 7, p. 365, and § 8, p. 381: for "Municipal," § 9, p. 430.

"a rule of Civil conduct prescribed by the supreme power in a State commanding what is right and prohibiting what is wrong[49]."

Civil conduct here means conduct of a person regarded as a Civis or Citizen. But the point which I wish to emphasise is in the last words of the definition. Whether borrowed from Cicero or from Grotius[50] they certainly involve a reference to some moral standard of Right and Wrong anterior to and independent of the legislative command which Blackstone is describing. It is only, he explains elsewhere, things *in themselves indifferent* which *become* right or wrong by legislation: "with regard to actions that are naturally and intrinsically right or wrong" what the Law does is merely to add remedies or punishments[51].

The last sentence of Blackstone's definition of Civil Law has been, I need not say, objected to by practical lawyers. His old editor Christian substitutes "Commanding what shall be done or what shall not be done"[52]: Stephen omits the sentence altogether.

Blackstone's assumed agreement of "Civil Laws" with some uniform moral standard may easily be decried as untrue or optimistic: but so far as his views express the connexion of national Law with national or popular Morality, there seems to be much truth in them, as I shall endeavour to shew in my section on that subject. How far, again, in speaking of our English Common Law, he gives up his principle of origination in command, will be considered under the head of *jus non scriptum* (§ 8, p. 380).

[49] Blackstone, Int. § 2, pp. 45, 46.

[50] Cicero, Phil. ii. 12. 28: Est enim lex nihil aliud nisi recta et a numine Deorum tracta ratio *imperans honesta prohibens* contraria. Grotius, 1. 1. 9: Jus...idem valet quod lex...regula actuum moralium obligans ad *id quod rectum est*.

[51] Blackstone, Int. § 2, pp. 54—56.

[52] Possibly borrowed from another *lex naturae* of Cicero (de Legg. 1. 6. 18): quae jubet ea quae facienda sunt prohibetque contraria.

I pass now to the authors who consistently maintain throughout the ruling idea that Law depends simply and unconditionally upon Command.

There is no mincing of matters with **Hobbes.** "Civil Law is to every subject those rules which the Commonwealth hath commanded him, by word, writing or any other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say of what is contrary and what is not contrary to the rule[53]."

Austin's Law properly so called consists only of rules or general commands actually imposed and signified by a superior authority[54]. *Command* he defines as the signification of a desire by a superior, coupled with the power and the purpose to inflict some evil upon the person commanded, in case that desire is disregarded, which evil is called the *Sanction*[55]. *Duty* or *obligation* is correlative with *Command* and simply means liability to the prospective evil which will result from disobedience. *Right* and *Wrong* in general, so far as Austin treats the subject (see above, § 1, p. 22), as well as rights and wrongs in particular, all flow, in his view, through the intermediate *Duty*, from this one source—Command of a superior[56].

Determinate source. The signification of desire constituting a command may be *express* or *tacit*—made, that is, by words or by conduct[57]—but it must proceed from some *determinate source*, i.e. either one rational being or a body of rational beings in which every member can be determined and indicated; which therefore has the faculty of corporate action, is capable of signifying a will and issuing a command, and has actually done so[58]. The last words are to be

[53] Leviathan, ch. 26, p. 137. I have used the English edition of 1651.
[54] Austin, *passim*. See specially 5. 178; St. 62, 63.
[55] id. 1. 91, 92; St. 11. Also Lecture 27, *passim*.
[56] id. 1. 92; St. 12; 18. 409, 410; St. 198, 199, &c., &c.
[57] id. 1. 102. [58] id. 5. 178, 179, 188, 189; St. 67.

emphasised, for the opinion or sentiment even of a determinate body, and held *universally* by the members of that body, if it remains merely in the form of opinion, is, in Austin's view, only *analogous* to law proper, like the general opinion of an indeterminate body.

On this subject there are some rather strange and paradoxical remarks of Austin, which he makes by way of explaining the following alleged caprice of current or established language. If a body, although determinate, be large or numerous, we do not usually, in speaking of law *set by the opinion* of such a body, distinguish between an opinion *universally* and an opinion *generally* held by its members: or rather we only think of the latter[59]. The reason surely is, not that the two "*can* hardly be distinguished," but that an opinion *universally* held by a large body can hardly be conceived as likely or possible. To the increased facilities for corporate action by large bodies, since Austin's time, I shall return presently.

Law improperly so called. We may pass, however, from what is certainly not a very common case—universal opinion of a large determinate body—to one obvious and ordinary enough—the *general* opinion of any large body, small ones being left out of account on the score of practical unimportance[60]. Here Austin, then, lays it down definitely that, as the persons holding the particular opinion cannot be determined or indicated, they cannot take the corporate action essential to the issuing of a command. We shall see that the value of this absolute statement has been questioned in the light of modern experience. At present we may note very briefly the somewhat unnecessary distinctions drawn between different kinds of determinate and indeterminate

[59] Austin[5], 5. 193, 194. This reasoning is largely omitted in St. and somewhat modified in Prof. Brown's version.

[60] Austin, l.c. See also below, n. 79.

bodies. Members of the former may be determined *specifically*, as the Messrs Brown, Jones and Robinson of a firm, or *generically* as the "representatives of the commons in Parliament." The case of the class rather than of the individuals is of course the one most coming under our present consideration. That indeterminateness may apply, not only to entire bodies, but to portions of determinate bodies, e.g. "all Gentlemen" or "the Gentlemen in the present House of Commons," is so obvious as scarcely to require statement[61].

Rules, then, imposed or said to be imposed by this *general opinion* of a class are, with Austin, in accordance with his definition of Law, and its essential requisite of command, Law improperly so called. Of the term Positive Morality which he applies to these and some other rules, I shall have to speak presently (below, p. 86): in the enumeration of Austin's Laws improperly so called, which follows here, Morality is used in the ordinary sense.

The conventional usages of Fashion are obeyed from regard to the general opinion of what is called Society: the "Laws" of Honour and Morality derive their force, with a large number if not a majority of their adherents, from that of Gentlefolk or Respectable People. The rules, usually known by the name of Constitutional Law, as to who shall be the repositary or repositaries of Supreme Power in a State, in what shares and with what mutual limitations, depend, at least for modern civilised States, in the last resort upon the virtual assent or acquiescence of members of the State in general—the "bulk of the Society[62]." Lastly, what most people will persist in calling International Law is still based (outside of individual agreements) on the

[61] Austin[5], 5. 187, 188; St. 67, 68. It is not necessary to complicate the question by a combination of *two* determinate*nesses*, as of a supposed sovereignty of Cromwell, Ireton, and Fleetwood, *with* a House of Commons elected in the ancient manner (Austin, 190; St. 69).

[62] Austin[5], 6. 266; St. 106, 107. See more fully below, § 4, p. 254.

general opinion or feeling of a certain Society of States who habitually obey and expect one another to obey rules, some of which they have at length formulated[63], but have not taken and probably never will take, joint action to enact or administer them[64].

On the practical efficiency and importance of some of these "Laws improperly so called," as also on the part played by one form of general opinion (Popular Morality) in the formation of all or most Law I shall have to speak elsewhere. Before, however, passing to the last point in Austin's definition (below, p. 67), I may note two considerations suggested by a considerable change in the *capacity for action* of large popular bodies since his time.

1. The possibility of Austin's "corporate action," on the part of a Nation or People, has been much increased, or rather created, by modern systems of registration and census. Whether the *Plebiscite* or *Referendum* be or be not a desirable way of settling some great political question (see below, § 4, p. 273), such questions can certainly be put to, and "corporately" answered by, an Electorate of which every member can be determined and indicated, or by a Nation of which every adult male and female is entered on a census roll. All masses of individuals registrable by reference to some matter of fact, can obviously rank among Austin's determinate bodies. Probably the only ones which are incapable of doing so, which are necessarily and intrinsically indeterminate, are those where the generic character is itself matter of opinion as in the instances given above (p. 61).

2. A question recently raised as to the truth of Austin's alleged inability of an indeterminate body to issue commands

[63] Austin[5], 183; St. 65. Cf. Westlake's International Law, Pt. i. pp. 7, 40.

[64] For the nearest approximation to such enactment, in very recent times, see below, § 9, p. 427.

may deserve some notice here; not so much on account of its author's substitution of *imperative effect* for command, as on account of the attention which he calls to a different and very important subject in the history of Law—the capacity or opportunity for Formulation.

"To one surrounded," writes Professor Dewey, "with institutions of a popular character and accustomed, almost every day, to see government affected and controlled by various agencies of clamour, mass meeting, petition and newspaper writing, this inability of a body numerically uncertain to express itself, as a body, in ways having the force of command, will, I think, seem less axiomatic[65].

Now, in this heterogeneous list of "agencies," some bodies are indicated which have become, on a principle distinctly recognised by Austin himself[66], *determinate*, e.g. the signataries of a petition or protest, the members of an association for some common object. Such associations are capable of corporate action and of making rules for their members like any other club. Of the actual efficiency of their rules I shall speak below (see pp. 88, 89).

It is evidently not so much with regard to this Austinian capacity of definitely commanding their own members, as to the power of influencing external persons or authorities, that Professor Dewey is here speaking of bodies possibly determinate, but generally indeterminate, vague and tumultuous.

The two are, however, connected together and Professor Brown quotes this same critic of Austin as elsewhere somewhat modifying his criticism and reverting to Austin's theory of Law and Sovereignty (see below, p. 67) in the following words, "Except as Sovereignty secures for itself definite and definable *modes of expression*, Sovereignty is unrealised

[65] Professor Dewey, of Columbia University, as cited by Professor Brown (pp. 61, 62) from the Political Science Quarterly, March, 1894.

[66] Austin[5], 5. 189, 190. Omitted in St.

and inchoate." These words suggest, as Professor Brown well points out, a possibility of distinguishing between *legal* and *moral* rules, by a difference in the *degree of organisation* which may exist for the purposes of their expression, interpretation and enforcement.

In support therefore of the view that Law ultimately originates in Moral Rules, I would conclude the present subject by insisting upon *possibility of formulation* as the first essential in the formation of Law in preference to Austin's capacity of signified command. While Sovereignty was as yet inchoate, a definable mode of expression, and indeed a definite if not definably appointed organ, certainly existed (unless we deny all truth to old traditions) in the Priest or Judge of early National Assemblies, which can scarcely be called in any exact sense *determinate*. In his public decisions and dicta, assented to and carried out, by whatever irregular means, we have at least a quasi-corporate national action possible, sufficient for making what may, in my view, be justly termed Law, although prior, as has been said, to the full developement of Austinian Sovereignty or the Austinian State (see generally below, § 5, on *Jus* and *Lex*).

Positive as generally = Human Law. In the last and most important limitation, by Austin, of Law as the subject of Jurisprudence, the exact meaning of that limitation is anything but apparent, at first sight, from the phraseology employed.

The antithesis of a principle or rule existing *φύσει* or *θέσει*, by Nature or by Institution, comes apparently from the earlier Stoics[67]. With them the idea of Nature was

[67] Of the third century B.C. It does not appear to be Aristotelian, at least in terms, though the division of *δίκαιον* as *φυσικόν* and *νομικόν* (see Eth. Nic. 5. 10 and for far earlier authorities P. J. pp. 54, 55) is much the same in effect. See, however, for a disputed meaning of *θέσει*, Arist. Phys. Acr. 3. 4; Bekker, 1. 205^{b} 34; also Schol. 366^{a} and Index 327^{b}. The first express use that I can find of the antithesis is attributed by Stobaeus (Ecl. ii. p. 184) to the older Stoics—*τὸ δίκαιον φύσει εἶναι καὶ μὴ θέσει.*

probably Atheistic, or at any rate independent of any Divine interposition: the second limb of the antithesis meant any non-necessary, arbitrary or voluntary arrangement, I think always of *human* origination, but not exclusively in the way of enactment or imposition by a superior. This is the sense in which *positivus* is used by Aulus Gellius[68].

As, however, Natural came, in Christian hands, to mean ordained or appointed by God, so Positive was understood to mean generally flowing or emanating from a *human* source. It is in this general sense that Austin uses the word, when he applies it to rules of Morality which are Laws improperly so called because only held by an indeterminate body of men and enforced by their mere general opinion[69]. Occasionally, however, he gives prominence to the idea, correct or not, that *positum* originally indicated actual imposition by a determinate superior, as where he tells us that strictly speaking every Law properly so called (which of course includes the Law of God) is a positive Law[70]. These variances of meaning are fairly explicable by the context, and unimportant compared with the arbitrary use of the term Positive Law = Law strictly so called, to which we shall come directly. But meanwhile a little space must be devoted to the attempt at explanation of what is really now a very unnecessary difficulty.

Natural and Positive as subdivisions of Human Law. Why the digression on Divine Law (see above, § 1, p. 23) should have been introduced into Austin's work at all is scarcely apparent, in his point of view, from its mere connexion with the theoretical Moral Sense. There was, however, a further reason, in a distinction often appealed to by old jurists, which may now, I trust, be safely disregarded

[68] A. G. 10. 4. 1—3. "Positu fortuito," "arbitraria": not necessarily imposed by *authority* as Holland[10], p. 41.

[69] Austin[5], 1. 86, 87. [70] Austin[5], 5. 171; St. 60.

—a *subdivision* of the rules of Human or Positive Law, as well as of those of Positive Morality, into Natural and Positive *par excellence*.

The former class includes those rules which are or are believed to be universal and common to all men, and are therefore styled Natural as prompted by Nature or, in Austin's phrase, fashioned upon the Law of God, as indicated by the Moral Sense or known by Natural Reason[71]: the latter those which are particular, not prompted by Nature, and, if in accordance with the Law of God, only in accordance with that Law so far as conjectured by the light of Utility. These are called Positive *par excellence* as being *solely* due to human institution[72].

The so-called Natural part of human Law is, it will be seen, equivalent to the theoretical *jus gentium* of the Roman lawyers, which was assumed to be common to all the world[73]; the Nature, to which they are in Roman language referred, being represented, in Austin's phraseology, by Divine Law, or rather God.

This subdivision of Human rules into Natural and Positive is represented by Austin as unintelligible, or at least not fully explicable, unless we take into account certain hypothetical *indices* to the unrevealed Law of God, which accordingly occupy the greater part of his 2nd, 3rd and 4th Lectures[74]: the *revealed* Law *ex vi termini* requiring no such index.

As has been already intimated, there seems to be no longer any necessity to enter into the obsolete subdivision of Human Law here described, or indeed into the question

[71] Austin[5], 5. 175.

[72] Austin[5], 4. 154, 155; 32. 569—571.

[73] For this, and the other more practical *jus gentium*, on which the *Jus Praetorium* was said to be founded, see above, § 1, p. 27, also § 6, p. 339

[74] Austin[5], 5. 176. Cf. 2. 105; 4. 143; St. 20, 44, 62, &c. The three *indices* are (1) a Moral Sense, (2) Utility, (3) a combination of the first two.

of a Law of Nature at all. See § 1, pp. 27, 28; and, on the sense in which Nature may perhaps be regarded as a *remote source* of Law, above, p. 51. The amount to which a Moral Sense is here adopted as such a source is treated in § 3, pp. 98—100.

Austin's Positive Law = Law strictly so called. Positive Law, if we combine the individual use by Austin of the two words separately, ought to mean general commands by *any* determinate human superior, i.e. person or body having the power to inflict a penalty upon those to whom the command is signified (above, p. 59). Positive Law would thus include the case of rules set by *private persons*, whether corporate or individual, as by a club to its members or a parent to his children: which Austin does *not* mean to include under the term Positive Law. He is therefore obliged to depart from logical consistency: on the one hand to class the rules or laws above mentioned, however "properly so called," with rules of mere "general opinion" under the comprehensive head of Positive Morality[75]: on the other, to confine Positive Law in an emphatic or special sense, as the subject-matter of Jurisprudence—otherwise "Law strictly so called" (see above, p. 47)—to the rules imposed and signified by men as *politically* superior, or *sovereign*, to men as *politically* subject[76].

This last point necessitates the definition of a State or Political Society, to the place of which, in Austin's Lectures, reference has been made above (§ 1, pp. 24, 25). Sir Henry Maine criticises this order of treatment, maintaining that a definition of Sovereignty should come first[77]. Austin's order, however, seems logically defensible on the ground that Positive

[75] Austin[5], 1. 87, 88; 5. 171.

[76] The distinction of Statutory and Judiciary or Case Law must be postponed till we come to consider the English *jus non scriptum*.

[77] E. H. 12. 347.

Law *strictly so called* is, according to him, a *species* of the larger *genus* Law *properly so called*. The view here maintained as to the original basis of Law differs, as will be seen, *toto caelo* from that of Austin (see § 3 generally), but is equally capable of consideration independently of the State, and may with the more propriety be considered first, if we find reason to believe that, in many early cases of Political Society, the growth of Law has been a factor rather than a result of true Sovereignty (see below, § 4, p. 165).

Austin's special use, therefore, of the word Positive in connexion with Law, excludes not only all rules of human conduct which depend upon religious motive or supposed revelation, but all which depend upon the "general opinion" of men, and also some rules which may be set by men to men in a form of express command. Two or three cases of the last class may be at once disregarded as too exceptional or fanciful to be worthy of practical consideration: e.g. rules set by men to men in a state of nature or by sovereigns to sovereigns[78]. Others, under the head of Autonomic Laws or Club Law may deserve a brief examination at the end of this part of my subject. For the present I think we may provisionally assume a common reason for their not being taken into any very serious account, in the comparative unimportance of them all.

It is, in fact, not here alone that the perception of unimportance or absurdity is allowed by Austin's good sense to over-ride the inconvenient logical results of some of his own definitions[79].

Post-Austinian use of "Positive." In the use of the word Positive by recent writers on Jurisprudence it is often meant to indicate, not so much the *position*, or ascertainable

[78] Austin[5], 5. 181; St. 64.

[79] See above, p. 8 and § 4, pp. 151, 167. Also Austin[5], 5. 193; 6. 231, and P. J. p. 146.

establishment of rules of human conduct by particular human influence or action, as the *actual existence*, past or present, of such rules with a definite amount of practical efficiency[80]. Even in Austin's time this meaning was doubtless in the mind of Von Martens when, as quoted by Austin himself (5. 173) he spoke of Positive *or Practical* International Law. By the same term (Positive), as applied to the same subject, Professor Westlake understands Austin as admitting "that the rules so described are sufficiently enforced and observed to have an objective existence[81]." Professor Salmond, too, though he only deals, in his own work, with Jurisprudence as the Science of Civil Law, that is the Law of individual States, objects to the use of Positive as confined to this limited sense, and admits International Law to be an equally Positive subject-matter, with a proper Jurisprudence of its own[82].

With such testimony to the modern meaning of the word, I need not now press any very close derivation of Positive in the language of Jurisprudence from the Comtist sense of "Confinement to the coordination of ascertained facts[83]," though of course this is true of all scientific enquiry as distinguished from *a priori* speculation. But I think that the idea of *efficient existence*, very inadequately recognised by Austin, may be now employed with advantage to include, under the term of Positive Law, rules of such importance as those of the Constitutional and International branches, the exclusion of which by the Austinian definition is equally objectionable whether on the ground of logic, history, or expediency[84].

[80] See, *contra*, Holland[10], pp. 9, 43.
[81] Westlake, Int. Law, Pt. i.[2] p. 8.
[82] Salmond[2], pp. 1, 3, n. *c*.
[83] See Littré, s.v. and Comte, Phil. Pos. i. p. 5.
[84] See P. J. pp. 186, 187.

Autonomic Laws. Considerations of common sense might, one would think, have dispensed with any serious notice of this subject, as treated by Austin, even if we admit that the term *law* could be properly spoken of as incumbent upon persons individually determined (see above, p. 54). The cases contemplated by him are primarily those of domestic relations recognised by Law—of rules set by father to child, guardian to ward, master to servant, in virtue of legal Rights conferred, on the party in authority, by the State[85]. And he draws the following distinction. If the imposition of the rule is made in consequence also of a legal Duty, the rule is virtually made by the State. We might instance, in our Law, parents ordering their children to attend school under the Education Acts, masters ordering their servants to contribute under the Insurance Act. If, on the other hand, the Right is one which its owner is free to exercise or not, the imposition being voluntary or spontaneous; the so-called legislation is called in the stricter or more correct sense *autonomic*, although its binding effect is entirely due to the State-conferred Right. But, in both cases, it is correctly said by Professor Brown that the act of the so-called private legislator does not really establish a new law but apply or bring into operation an existing one[86]. As to "imperative laws" set by lenders to borrowers and patrons to parasites (Austin, l.c.), no doubt a certain uniformity of conduct in individuals may be produced, under such temporary relations, by threat or promise; but it is an obvious misuse of language to talk of Law. It should in fairness be added that Austin himself practically throws overboard the Autonomic laws "if such they can be called," set by private persons, in the latter part of his work[87].

It must, however, be remembered that the style

[85] Austin[5], 5. 181, 2 and n. *f*; St. 64, 65.

[86] Austinian Theory, p. 47.

[87] Austin[5], 28. 524; St. 261.

Autonomic or Autonomous has also been applied, though not by Austin, to Laws of a really general incumbency, such as the ordinances of a University and the bylaws of a Railway Company, which last at any rate may affect members not merely of the particular body but of the public at large. These bodies are, at least as compared with the official legislative body, *private*. But they have truly legislative power, within specified limits, which is *delegated* to them by the Legislature proper[88].

Club Laws. The Laws of a Club, which are set by a determinate body of private persons, come of course under Austin's designation of Law properly so called, but are excluded by him from Positive Law and placed under the heterogeneous heading of Positive Morality (see above, p. 67). The distinction between the rules of a Club and the resolutions of a legally recognised Company is rather subtly, but, I think, truly, drawn by Salmond. Although the latter may not, as in the case of Railway bylaws, affect outsiders, they have as regards the members or shareholders a character which is truly that of delegated legislation as distinguished from merely mutual agreement or convention[89]. In the rules of a Club, on the other hand, the latter is rather the case. The material difference may not be always very perceptible, but I think it is well shewn by Professor Brown that, although the penalties of Club Law may be sometimes enforceable under State authority, what is enforced is really matter of Contract, into which the individual incurring the penalty has entered by becoming a member of the Club, and such enforcement is by the general or ordinary law of the land[90].

[88] See on this subject Salmond[2], pp. 130, 131. On the slightly different case of legislation by Boards, Commissions, &c., see below, § 4, p. 192.

[89] Salmond[2], p. 131.

[90] Compare Brown's note on his pp. 47, 48 with that of Salmond on l.c. p. 131.

The rules of a Game, which at first sight might appear to stand on much the same footing as the laws of a Club, are not in any sense imposed, though they may be formulated by some determinate body, whether with or without express penalties on infringement. They depend simply upon the general consent of those who may play the game. I suggest this instance, which is not, I think, taken by Austin, because it seems to me to furnish a sort of parallel to the case of International Law, at least up to very recent and not very definite arrangements (see below, § 9, p. 426). The actual Sanction is, in the former instance, the avoidance, by intending players, of an individual who will not "play the game." So, in the case of International Law, distrust, limited and cautious dealing, in the last resort suspension of diplomatic relations, will be the natural penalty on any State which flagrantly disregards any generally recognised rule of International Law. And here the game of mutual intercourse is not a voluntary affair: it is one which *must* be played between neighbours, in all but the rudest relations of barbarous tribes—or natural man according to Hobbes[91].

General criticism of Austin. In the first part of the points above stated, from Austin's definition of Positive Law—its confinement to human conduct and its generality—there is little but a useful clearing of the ground. I would only add—what seems a necessary conclusion from the latter point—that anything which we are to call Law must either be in the *form* of a general rule or principle or must implicitly contain one. The gist of this remark will be apparent when we come to consider the subject of *jus non scriptum*, and, in particular, of Case Law.

In the part, too, which treats of Law strictly so-called,

[91] Leviathan, ch. 13, &c. As to a Natural Community of Civilised States, which are all necessarily to some extent neighbours, see Oppenheim, Int. Law[2], i. 10.

while some of the cases put might be dismissed as logical pedantry (above, p. 55), the main contention agrees with the ordinary use of words. The term Law with a capital, or "the law" in an emphatic or proper sense, would be confined by most people to the rules obtaining among men as members of Political Societies or States, to the exclusion alike of the rules "properly called laws" of a Club, and of those "improperly so called" of Fashion, Honour or Morality.

Austin's peculiar use of the last word will be considered towards the end of this section. I must also assume for the present some general understanding of what is meant by a State, deferring definition, in order to come at once to Austin's postulate of *signified command.* For it is on this point that we have to enquire (1) whether his definition must not be somewhat modified, when it is compared with the various modes in which Law has grown or been made, within States, in former times and is still being made in the present: (2) whether the conception of Law cannot be extended so as to cover the important subjects excluded by Austin but universally known as Constitutional and International Laws.

Imperative character and application of Law. In discussing the *signified command* which is the essential, according to Austin, of all Law properly so called, we may begin by enquiring how much can be admitted, and eliminating apparent but unreal objections.

All human Rules, including Law, are in their fundamental character, though not necessarily in literal form, *imperative* or *directory*—they speak categorically, and neither suggest nor admit the alternative of disregard. So far, they are, as Hobbes wrote, "not counsel but command": they do not say, you may or may not do this or that; or, a certain act may be done in this or that way, but you must or must

not do this, the act in question must be done in this and no other way. A number of "non-imperative legal principles" which Professor Salmond quotes as existing in any well developed body of Law may, I submit, be easily shewn to have an imperative character in the above sense, so that there is no necessity to resort to the fiction of their being commanded to judges[92].

Some apparent exceptions to this imperative character of Law have been mentioned by Austin himself in certain cases of direct enactment by a Sovereign, e.g. *declaratory* and *repealing* statutes (which he strangely classes with laws metaphorical or figurative) and "*permissive*" legislation[93].

The first two cases are satisfactorily disposed of in an Article of the Encyclopaedia Britannica cited by Professor Brown—"if read together with the previous Statute or rule of law, they are perfectly consistent with an imperative character in the whole[94]."

What Austin meant by *permissive*, as distinguished from *repealing*, laws is not very clear. If it is, as I suppose, the *release* of certain persons, or of persons engaged in certain transactions, from previous general obligations, this is simply, as he puts it, to confer new rights upon the favoured persons, and so to impose upon others the obligation to respect those rights[95].

Entirely different is the modern case, which of course Austin had not in view, of what was called *par excellence* the Permissive Bill, whereby it was proposed to allow local bodies the option of legislating on the drink traffic within their district. Statutes also have actually been passed enabling similar bodies at their option to make other regulations,

[92] Salmond[2], pp. 51—53. [93] Austin[5], 1. 98; 5. 214; St. 17, 81.

[94] Brown, p. 27. See too Austin, 37. 637. This and a good deal of other matter printed at the end of Lecture 37 in the larger ed. is omitted in St.

[95] Austin[5], 1. 98, and note at end of Lecture 12, p. 355.

impose rates, &c. But in all these cases though it may be in the first resort optional to the persons or bodies concerned whether they will acquire and exercise the powers specified—as it is optional for a man to make his will—yet the State prescribes the way in which the powers must be acquired and exercised, or the will made; and the State will enforce the new rights and obligations consequent thereon[96].

Several cases, besides the above, have been suggested by Mr Frederic Harrison and others, in which the imperative form of Law is by no means obvious at first sight: but we may agree with Markby[97] that there is no insurmountable difficulty in bringing them under Austin's definition, so far at least as a general imperative or directory character is all that is at present claimed.

On what has been called the imperative *application* of Law little need be said. It seems a self-evident proposition that by "the Law" of a State we mean generally the rules and principles recognised and *applied* by the State's authorities judicative and executive[98]. That *enforcement* will be occasionally required follows as a matter of course, in a body consisting of a mixed multitude of human beings, some of whom might not unjustly be characterised as fools and perhaps a few as knaves. But I submit that enforcement is wrongly regarded as the *primary* conception in the administration of Law, or fear of penal consequences the *primary* motive for obedience[99]. On this point I think it must be admitted that Austin's dicta at least convey a wrong impression. As to his definition of Sanction itself I would merely add a few explanatory remarks.

[96] See Brown, pp. 338, 339.

[97] Markby[6], p. 3.

[98] I purposely avoid here the ambiguous word Administrative, see § 4, p. 170.

[99] See Brown, pp. 342, 343; also below, p. 78.

Sanctions. Austin's expressions on this subject are simple and plain (above, p. 59); but it may be as well to clear away a certain amount of indistinct reasoning which is not really due to him.

It is immaterial whether the verb, from which *sanctio* comes, meant originally to command under penalty or merely to make firm[100]. Sanction is here taken simply as a technical term of Jurisprudence. As such it is, I think, regularly understood only of evil to be incurred by nonconformity, not of good to be obtained by conformity, to a rule. To quote one of Blackstone's safe generalities:—Human legislators have for the most part chosen to make the sanction of their laws rather vindicatory than remuneratory[101].

As such technical term, again, sanction means evil resulting from the *extraneous* disapproval of some *other* being or beings capable of understanding human conduct and motives[102]. This postulate of extraneous displeasure as an essential inducement to obedience to Law excludes from that category any rules of conduct obeyed *purely* on intrinsic grounds of self-approval or disapproval[103]. Neither, of course, does Austin's conception admit of what Bentham called Natural or Physical Sanctions—evils which would follow from our conduct "in the ordinary course of Nature[104]." It is apparently to some lax expressions of the same author (Bentham) that we owe the rather gratuitous difficulties of Austin's 23rd Lecture, on Physical Compulsion distinguished

[100] See Austin[5], 27. 507. Add, on the derivation from *sagmina*, Marcianus, Dig. 1. 8. 8. 1 and Festus 320 (P), 321 (F). *Sancire*, according to Fick, ii.[3] 284, cited by Curtius, p. 379, =*fest machen*: for the other view see P. J. p. 133 and notes.

[101] Austin[5], 1. 91; St. 13; Blackstone, Int. § 2, pp. 56, 57.

[102] Austin[5], 1. 86. Cf. P. J. p. 125 and n. 27.

[103] Austin[5], 5. 208; St. 78; also Brown, p. 88 and P. J. pp. 119, 125.

[104] Bentham, Traités, 1. 43; Principles, p. 25; Austin[5], 5. 212, 213; St. 80, 81.

from Sanction. As I understand the point, it seems to be this—Physical Compulsion may or may not be the particular evil *the apprehension of which* induces obedience to Law: but, in any case, such obedience is a matter of *voluntary conduct*, resulting from a feeling of the *mind*: physical compulsion, in itself, can only have a present material effect upon the *body*.

Again, when Bentham speaks of a criminal's "obligation to suffer punishment" he apparently *may* mean the *material or physical condition* of the person in question, viz. that, whatever his own wishes or feelings, he will have the suffering in question inflicted on him. Austin, on the other hand, always, I think, uses the word *obligation* of a *mental condition*, in which desire or avoidance can operate on the will and so produce action. "Obligation to suffer" should, I suppose, in strictness be "obligation to submit to suffering" or "to do acts which will facilitate the infliction of suffering[105]." But the whole matter is not worth the trouble of explanation.

Sanction, then, in Jurisprudence, is limited to *extraneous human disapproval* and its consequences. In ordinary Law the disapproval is that of the State as represented by its authorities, to which disapproval our present consideration is confined. The Sanctions of Constitutional and International Law, though they fall under the above general definition, have not the same organised manifestation and require separate notice (see below, § 4, pp. 255—259, and § 9, pp. 426—428).

This disapproval, by the State, of possible nonconformity, with the contingency of enforcement, must no doubt be

[105] Austin[5], 23. 455, 456; St. 222, 223. The passage referred to in note 100, as Traités, 1. 239, 245, is apparently from the first edition of 1802, which is the one among Austin's books collected in the Inner Temple Library. There is nothing on the subject in my edition of the Traités cited in my last note.

admitted as a primary essential of ordinary Law. But it is not, I submit, truly construed as a *threat ab initio*: we should surely ignore psychological fact, at least in any degree of developed civilisation, if we regarded the general obedience to Law as paid merely from fear of evil[106].

To pass, however, from this subjective aspect of Sanction, operating on the mind as a motive, to its objective existence as an actual evil or inconvenience—there is a *prima facie* difficulty in making out the latter, for *all* cases, somewhat similar to that which has been experienced in making out a universal imperative character in the *expression* of Law (see above, p. 74).

Professor Holland, speaking generally of the Sanction of Law as "an intervention of the State," explains that the State intervenes not only with a view to punishment (as in the view of *sanctio* by Just. 2. 1. 10), or occasionally to prevent anticipated illegality, but also to effect restitution. It is, moreover, he goes on to shew, a virtual punishment to a wrongdoer "or to one who neglects to comply with prescribed courses of procedure, if his wrong be merely undone, or his faulty procedure fails of its effect; because he has, as the saying goes, his trouble for his pains[107]." This last idea is partly expressed by Austin in what he terms the Sanction of *nullity*[108], and the same principle will really cover a case which is at first sight more difficult: where all that the State does is, negatively, to refuse, to a contravener of its legal rules, a procedure which would otherwise have been available for him[109]. Perhaps the matter may be put generally

[106] See Holland[10], p. 22: Bryce, on Obedience to Law, Studies ii. 44—48: Brown, p. 202 (referring to the above cited chapter generally): also p. 52 on International Law.

[107] Holland[10], pp. 85, 86. [108] Austin[5], 27. 505, 506; St. 252.

[109] See Brown's excellent note, pp. 9, 10. The instance referred to was the refusal, by the Court, of action to enforce a contract for a purpose recognised, by the Law, as improper.

thus. Nonconformity to the Law of the land will always involve some detriment to the nonconforming person, due to the action or non-action of the State authorities[110], but that detriment will vary from personal pain and penalty to loss of time and trouble, or mere disappointment of expectation. The case of *costs* payable by a loser in a Civil Action is simpler, and no great difficulty will be felt in admitting Austin's view that the liabilities under such actions may be called Sanctions with the same propriety as punishments under a Criminal Procedure[111].

"Imperfect" Laws. This name, justly objected to by Markby[112] for the vague and various meanings which it covers, is assigned by Austin to express enactments in which the legislator affects to command but annexes no Sanction on disobedience to the Command. He admits however that in any such case of English Law (as I think of modern Law generally) a Sanction will be presumed[113]. Whether this means that the Court will supply a direct Austinian Sanction in the form of penalty; or merely that obedience will be exacted, through the inconveniences amounting to Sanction in the wide sense above given, does not very clearly appear. Professor Brown adopts the more general interpretation at least as regards private legal Rights and Wrongs, citing the well-known maxim *ubi jus ibi remedium*[114].

[110] Forbearance, i.e. distinct declining to Act, will fairly come under Action. "Non-action" is intended to cover the rather more indirect case where the legal Rights, expected to result from what *was* "faulty procedure," are *not* supported by authority.

[111] Austin[5], 27. 503, 504; St. 251, 252. Cf. the first pages of F. J. Stephen's General View of the Criminal Law of England.

[112] Elements of Law[6], § 838, pp. 410, 411.

[113] Austin[5], 1. 99, 100; St. 18.

[114] From Ashby *v.* White, see Brown, p. 25, note. I presume he considers the above to be the maxim referred to by Austin, l.c.

The only recognition by the Roman Jurists (to whom Austin refers) of *leges imperfectae* is to be found in a fragmentary passage from Ulpian's *Regulae*, where an omission to *rescind* a prohibited act is represented as making the enactment of prohibition *imperfect*: an intermediate condition, of approximation to *lex perfecta*, being recognised where a penalty has been imposed, though without rescission[115].

This *trichotomy* of Ulpian's, which has, I think, escaped the notice of Professor Goudy (see his most interesting treatise under that name, p. 20), has not only a limited application[116] but a comparatively small practical importance. In the *lex* instanced as *minus quam perfecta*—the *Furia testamentaria*—a fine of quadruple amount far exceeds any penalty of rescission. In the *lex Cincia de donis et muneribus*, which it is thought may have been the instance intended of a law with neither rescission nor fine, it must be remarked that although the law did not expressly avoid the donations which it forbade, it made them, during the life of the donor, of practically no (secure) effect. If matter of conveyance, the conveyance could be revoked by him; if of promise, its claim could be defeated by *exceptio*[117]; so that there was at least a *potential* Sanction of nullity against the recipient. It must be added that the part of this fragment including a reference to the *lex Cincia* is a mere so-called "restoration"; and that the doctrine of Ulpian, as to prohibition not implying rescission, is abrogated, if not declared bad law, by a Constitution of Theodosius and Valentinian[118].

[115] The Preface to the Regulae, §§ 1, 2. See Collectio libb. juris Antejustiniani, ii. p. 5; Muirhead's Gaius, 359, &c.

[116] See Karlowa, i. 427, 428.

[117] See Moyle on Just. 2. 7. 2. (p. 234) citing *inter alia* Fr. Vat. 259, 313. Also Karlowa, l.c. n. 5.

[118] A.D. 439. See Cod. 1. 12. 5. See also, on the *imperfectio* of the lex Cincia, Savigny, System, iv. § 203, p. 550; Karlowa, ii. 587; Girard[5], 939. 1.

Signified command. Admissions. I pass now from the admitted imperative character and application of Law, and the more difficult assumption of Sanction as, in some form or other, universal; to the most striking of Austin's postulates—based upon Hobbes—of *definite command,* i.e. express or implied *signification* proceeding from a determinate sovereign source. This is the point upon which we have the most difficulty in reconciling Austin's definition with actual fact; but I shall begin, as above, with marking off so much as must be fairly admitted to be a true statement of fact.

1. It may be taken for granted that, in a fully formed State, whether modern or ancient, there can usually be pointed out some person or body of persons in whom a supreme authority is broadly or generally understood to reside: so that the action, whether legislative, or administrative, of any *other* authority may with justice be regarded as ultimately that of this "Sovereign[119]." The questions of divisibility of Sovereignty, and in what part the Supreme power does really reside, which are not to be answered by mere statement, will be considered hereafter in § 4, where I shall endeavour to shew that the Supreme *legislative* body is the true Sovereign.

2. It is again obvious that considerable part of actually existent law, in most political societies or States, consists and has long consisted of Statutes, i.e. of direct declarations made mediately or immediately by such Sovereign, which, whether their Sanction be express or presumed, are meant to be enforced, and are therefore virtually commands.

3. In what is generally the larger amount of law, which, though not belonging to the Statutory class, is *administered* by State authorities, much may be accounted for,

[119] As to derivation, simply the one *over* the others, see P. J. p. 160, n. 11.

though only perhaps recently in continental systems, on Austin's principle of "judicial legislation," i.e. may be definitely traced to judicial decisions, and, where the judges are of the sovereign's creation, may in theory be regarded as matter of Command by the Sovereign.

The objections which, in spite of a recent and very able defence of Austin's definition, by Professor Brown, I must continue to bring against it, are the following:—

1. It does not agree with the actual beginning of many bodies of national Law, which clearly took their rise in the administration of certain principles of justice or propriety: such principles not being regarded as having anything to do with the will of a sovereign person or body; and such administration being sometimes independent of the existence of any regular Sovereign power at all.

Austin's axiom deducing all Law, as the subject of Jurisprudence, from Sovereign command, may in fact be almost certainly shewn, when applied to the *origin* of most old and some modern systems of Law, to be false, both on historical and philological grounds. Strong objections against his theory, in this particular respect, have been, as is well known, successfully based by Sir Henry Maine, and the school which he founded, upon early legal institutions and conditions as compared with certain modern survivals[120]. These considerations necessarily suggest some enquiry into the relative priority of the State and Law, with a consequent revision of Austin's dicta as to their mutual relation. It may, for instance, be not improbably maintained that rules, to which the name of Law cannot reasonably be refused sometimes *precede* the Austinian State and are not so much its creatures as its factors.

The origin of States is a subject almost entirely omitted by Austin, whose principal notice of it is negative, being

[120] See particularly, E. H. ch. 13.

mainly devoted to demolishing the theory of an original Social Compact[121]. I have elsewhere endeavoured to illustrate the particular question of relative priority mentioned above, by comparison of what can be made out as to the early history of Roman Law, with a few analogous cases. But the text of my present section on Law and the State is mainly confined to the subjects treated in Austin's 6th Lecture.

Similar objections to the Austinian definition, as bearing on the first beginnings of Law, have been drawn from the original meaning of *words* and *phrases* connected with Ancient Law—a branch of testimony to which I have previously devoted some special attention[122], and for the admission of which we have Austin's own example. For he obviously means to support his fundamental idea of Command, or conformity to Command, by a supposed common meaning in the different names for Law and Right which have been used, from remote antiquity, by leading nations of the Indo-European stock[123].

Now the testimony of language in these cases, when examined by the Science of Comparative Philology (which had scarcely any existence in Austin's time), *does* indicate a class of ideas, akin to one another, but materially different from that of Command, as the first meaning of the words in question.

Many of the older names unmistakeably indicate a basis of Morality, as the word is ordinarily understood, which must be taken indeed for some of them in a rather higher sense, so as to include Religion, but always, I think, presumes a specific feeling of absolute approbation or disapprobation most inadequately expressed by the vague and neutral "opinion" which Austin designates as Positive Morality (see below, p. 87).

[121] Austin[5], 6. 299—326; St. 127—140.
[122] P. J. i. chs. 2—7.
[123] See Austin[5], 18. 409, n. 69; St. 198.

I propose in a later section, on *Jus* and *Lex*, to set down briefly the results of this philological enquiry with special reference to the particular case of Roman Law. A transition, in the same case, from original Common Law, if I may use the English phrase, to Statutory Legislation, will at the same time be treated as evidenced on similar grounds: the philological results being supported, as far as may be, by fairly established facts in early Roman history.

2. Such enquiries into the remote origin of Law and the State, however interesting as a matter of history, and proper to the subject of the present work as a whole, are no doubt at first sight liable to the charge, which has in fact been brought against them[124], of antiquarianism and want of practical bearing upon the Law and Jurisprudence of the present day. This charge may, I think, be met by some of the arguments upon which my second principal objection to Austin's theory is based—with regard to his treatment of what he practically sums up under the heading of "*judiciary legislation*."

In the first place, his account of this matter, to which he devotes a great deal of intricate and sometimes wearisome reasoning, is after all a onesided and inadequate view of a larger subject, best described by the negative style of *non-statutory law*. When we come to examine the different Modes and Forms in which Law has been made, and which must, as I hold, be specifically taken into account in the initial definition of Law (above, § 1, p. 21), we find that we are obliged to recognise a process, hereafter treated under the title *jus a prudentibus compositum*, as not only traceable in the earliest beginnings of an old legal system, like the Roman and our own, but as having an actual existence and a growing importance in legal systems of the present day—a process which is by no means identical with the "judiciary

[124] See Brown, p. 334; Salmond, pp. 48, 49, &c.

legislation" proper of Austin, though its *material* may be, for the most part, supplied by judicial experience and decisions.

Again, when dealing with his own judiciary legislation, in those countries, notably England, where it is expressly recognised, Austin, as has been indicated above (§ 1, p. 23), dwells so emphatically on his doctrine of the Sovereign's indirect command, that he leaves on the mind little beyond an idea of the "formal source" or the machinery by which Law thus made comes, with us English, into its current shape. He pays little or no regard to the "persuasive sources," as Professor Brown calls them[125], of a new judicial decision—the *materials*, as I would rather put it, employed by the modern judges, of whom he is speaking, whenever, by starting a fresh precedent, they practically make new Law.

In the course of the following section I shall endeavour to shew how the element of popular or current Morality not only appears to lie at the beginning of most old Law but actually is an undoubted ground of judicial decision in our own day: so that there is no antiquarianism in the consideration of a fact equally important as ancient or modern. Further, under the head of *jus non scriptum*, how, in any view of non-statutory Law wider than the most exclusive English doctrine of direct judicial precedent, Custom and Practice are real and assignable Sources of Law: Sources which require to be seriously treated, together with Mode and Form, instead of being left in a sort of Limbo of "remote causes[126]."

3. It may perhaps be considered a mere matter of words and names that Austin's definition will exclude the greater part of what all people are agreed to call Constitutional Law (see, however, § 4, p. 240), and what most people are

[125] Brown, pp. 289, 294.

[126] See generally Austin, Lectt. 30, 37 and P. J. pp. 327—329.

agreed to call International Law: so that the orthodox Austinian, it may be urged, would not regard with any the less respect those "Rules of Positive Morality" which pass under the above names.

Yet, with reference to the subject of International Law, I certainly think that I have more than once observed a very depreciatory treatment of some of its most useful and beneficent rules, in high diplomatic quarters, based on such crude dicta as that "International Law is not Law at all," &c., &c.

Nor is it impossible that a similar prejudicial effect might be experienced from any extensive prevalence of the same tone of thought with regard to rules or principles customarily observed within a State as to the location of Sovereign power, the divisions, if any, of that power and their mutual relations to one another. The peculiar Sanctions of these two classes of rules (Constitutional and International) will be considered hereafter (§§ 4 and 9). Meanwhile it is surely desirable to see how far a reasonable conception of Law Positive, in the modern sense of Positive above noted (p. 68), may be extended so as to cover them, as well as the rules which can be more or less correctly regarded as imposed by a Sovereign (see above, p. 82).

4. **Austin's "Positive Morality."** Enough has been said above (p. 85 and § 1, p. 24) as to the necessity, in a work on Jurisprudence, of entering to some extent into the subjects of Custom, Practice and Popular Morality, which are treated in the following section. This is rendered, however, more particularly necessary, in following Austin, from the very indiscriminating use by him of the term Morality in his phrase or classification "Positive Morality." The main point is, that, besides certain comparatively unimportant logical inconsistencies, he practically ignores the distinctive character in Morality or Moral Judgement, as ordinarily understood; which, in my view, renders Popular Morality a

prime factor, not only in the remote origin of Law, but in its daily growth and improvement at the present time.

I shall, however, conclude this section with some remarks upon one of Austin's cases of Positive Morality, in which the Morality, in the ordinary sense, is rather that of a Class than a People, but the resulting rules of conduct, though certainly not Law "strictly so called" (see above, p. 67), are of sufficient practical importance to deserve present consideration.

Clubs economical and political. One of the logical inconsistencies, to which I have referred, is the coupling together, by the merely negative fact of Non-Sovereign Source, two classes of rules so essentially different, in respect of direct Command, as those set by general opinion and the laws of a Club. In speaking of the latter, I am now confining myself to cases where the penalties on infringement are *not* exacted under the authority of a State, either as matter of delegated legislation or contract (see above, p. 71), but are imposed and carried out by the members of the Club alone.

Having regard to the suggested modern acceptation of the word *positive*, with the sense of practical efficiency, we might be inclined, at first sight, to lay aside all Club laws together with those called Autonomic (see above, p. 70) as comparatively unimportant. As a matter of fact, however, political or economical associations which partake of the nature of Clubs in their capacity for corporate action (above, p. 63) have in times past exercised a considerable paralysing or disturbing influence upon regular governments: and it is not impossible that they may, in the present day, become engines of *positive* importance both in National and International affairs.

With regard to the past, to take one of the most prominent cases, the secret tribunals of Westphalia, four or five centuries ago, derived their strength mainly from the

weakness or inefficiency of local administration, and were confined to a few ill-governed States. More recently, Freemasonry has been credited with powers greater perhaps than it ever really possessed, from a certain amount of secrecy as to membership, and a somewhat puerile mystery as to its semi-esoteric rites. An inner organisation, with more or less subversive social and political aim, is still occasionally attributed to Freemasonry, more, I think, by continental than English writers; but these alleged projects will need to be made much clearer and more public before they can attain any degree of practical force.

There is no such mystery about the objects, or doubt about the power, of the modern associations formed among the Labouring Class for political or social purposes. They have their rules of conduct formed and promulgated, through facilities of intercommunication and joint action, far more efficient than any that were ever possessed by the Vehmgericht or the Freemasons. As to the possible enforcement of such rules, by mere sanctions of dislike and avoidance, I would refer to the vigorous passage in Locke's chapter on Moral Relations, which I have elsewhere quoted in extenso[127], and to the modern term, only too familiar, of *boycotting*, even when confined to its most harmless negative signification of sending to Coventry. These sanctions exercise, of co[illegible], their special efficiency among the poor, who have, in all cases, comparatively small power of escaping from their immediate surroundings, and more particularly so when massed together by common industrial employment. Not infrequently, however, the rule of the Trades Union, or other of the Associations here referred to, has been enforced by infringement of private right, or compulsion to "come in," which are distinctly against the Law of the land. Of

[127] Essay ii. ch. 27, § 12. See P. J. p. 190; also Miller's Lectures on the Philosophy of Law, p. 15.

course there is no word but that of indignant censure on any Executive which should temporise with such illegalities in order to gain popularity or party advantage. And it is to be deplored that both our own Legislature and Executive should even appear to have erred in this direction[128]. As to the purely Moral influence of industrial associations in the election of Members to a Representative Assembly; whatever the objects generally avowed, I conceive no objection can be taken, so long as individual freedom is respected. On the questionable doctrine, however, of express Mandate a few remarks will be made hereafter (see § 4, pp. 235, 236).

In the recent developement of Trades Unions, combining into larger associations of the "Labouring" Class, we have seen an undoubted control more or less perfectly exercised by leaders, in dangerous juxtaposition with the ordinary powers for the maintenance of order; and something almost amounting to a rival legislature by the side of the national legislature proper. Larger International combinations have been from time to time threatened; though it may be doubted whether such control would be so complete, or the common action so easy to direct, in the face of racial differences and jealousies. Some of the objects of the particular associations, to which I refer, do generally appear, at least to persons of property, likely to be chimerical in their ultimate outcome, and are obviously disturbing and alarming in the intermediate process.

There is indeed one conceivable result from the larger World associations of Labour, that perhaps should be set against the tyranny and short-sighted class selfishness which

[128] I refer particularly to the Trades Disputes Act of 1901, § 2, allowing the "attendance" of one *or more* persons at or near a workman's residence for the purpose of "peacefully persuading" him to work or abstain from working. Whether the outrages which, as a matter of fact, generally result from "peaceful picketing" have or have not been checked with sufficient firmness, is a matter of opinion.

there is only too much reason to fear from national Labour domination. It may after all be only in such wider unions that we must look for a check on what aggressive militarism still exists among civilised nations, and on the increasing rival armature, which is such a dangerous incentive and provocative, besides being so terrible a burden and drain (see however below, § 4, p. 188).

In concluding this general survey of what may fairly be meant by Positive Law, and criticism of Austin's definition, I feel much hesitation in substituting any similar attempt of my own. My motive is not merely the well-known caution to flee the task of definition *tanquam scopulum*, but a feeling, the result of experience, that definitions, at least in a subject like the present, are of little use except as memoranda or indices, recalling results obtained and explained by previous reasoning at length. If mere short cuts facilitating the omission of such reasoning, they are distinctly prejudicial to real study, though most useful expedients for the cursory examiner or evasive examinee.

Taking *positive* to indicate efficiency and importance, I should say that any rules of human conduct actually obtaining among any considerable number of human beings, in some manner connected or associated together, by virtue of *human sanctions*, might not improperly be called Positive Law. In postulating human sanctions, I am not so much recurring to a supposed original meaning of *positive*, or questioning the mixed and various motives for obedience to Law, as relying on the assumption, which few will contest, that no rules can as a matter of fact prevail or obtain generally among a considerable number of individuals without *some* sanction of human displeasure on their infraction.

It is not, however, enough to be content with the above very general statement or definition. Austin's further *differentia* of Law *strictly* so called from Law which may

properly be so called, agrees so far with general opinion, that the associations of human beings among whom Law, as ordinarily understood, obtains are certainly considered as Political Societies or States. On Law and the State I have to speak in a later section, and *inter alia* of what I myself regard as the primary function of a State—the administration of general justice by some recognised organ (see § 4, p. 168). There are other points, of Territoriality, Centralisation of power for War, &c., which must be taken into account, but this seems to me the main difference between the rules of any mere Union, National or International, whether of Labour or Capital, and Law strictly so called. That term may, in my view, be applied with correctness to the rules of conduct that have obtained among the *elements* of which a State has been formed: but I agree that Law, the particular subject of Jurisprudence, is more generally and naturally apprehended as obtaining among members of a fully formed State.

In its simplest and most ordinary occurrence Law might be defined as the rules of conduct administered and enforced, mediately or immediately, by the supreme authority of a State: Austin's *imposition* (above, p. 81) being at any rate matter of question. But such definition obviously will not cover the ultimate rules of Constitutional Law, i.e. the rules regulating the composition and functions of the supreme authority itself. Here, there *can* be no *imposition*, and the enforcement must depend upon some different Sanctions than those of ordinary National Law. The same remark applies to the rules of International Law, which do, on the whole, regulate the conduct of Sovereign, i.e. Independent States as between one another.

Professor Oppenheim would bring all these three cases—of ordinary National, Constitutional and International Law under one common definition of Law, viz. a body of rules

for human conduct within a community, which, by common consent of the community, shall be enforced by external power[129]. In his very able plea for International Law, as *Law*, he makes out satisfactorily a real community of modern civilised Nations: the consent to enforcement is not, as yet, quite so clear. But the particular character and operation of the Sanctions of International Law will be better treated when we come to consider more closely those of Constitutional Law, with which they have much in common, and also the special work of Text-book writers. In one respect, as we shall see, International Law stands now, as to some part, upon a more assured footing than an important department of the National Law obtaining in some countries. I refer to recent authoritative or quasi-authoritative Formulations (see § 9, p. 425). Formulation may, it is true, be also perhaps taken as a fact, so far as literary authority goes, in much even of "unwritten" Constitutional Law such as our own (see § 4, pp. 238, 254). On the other hand, it is wanting, or only existent to a much less authoritative extent in Text-book Law, for that large mass of rules, arising from judicial decisions, in England and America, which is certainly administered by State authority and enforced by State Sanctions.

On the whole, therefore, in defining or failing to define Positive Law as the subject of Jurisprudence, I cannot venture much beyond my initial statement of what is Law properly so called (p. 90), with the addition that the individuals among whom it obtains are either human beings regarded as belonging to States or the States themselves. Leaving the matter there, I shall pass on to consider the connexion of Morality, in the popular sense, with Law, and the relation of Law with the individual State, followed by an examination into the particular Modes and Forms of Law.

[129] Oppenheim, International Law[2], i. 8.

§ 3. MORALITY AND LAW

HETEROGENEOUSNESS of Austin's "Positive Morality," pp. 93, 94. Morality as ordinarily understood, 95. Right and Wrong, 96. Butler and the Stoics, 97, 98. Modern theories; the social instinct, 98, 99. Imperative character of moral judgement, 100. Operation of a common conscience, 101, 102. Morality in early Judiciaries, 103, 104. Morality in later Law Courts, 105. Equity, 106. The *aequitas* of Austin and Maine, 107, 108. Early moral idea of *aequus*, &c., 109. *Aequitas* in Cicero and the Jurists, 110—112. Modern Equity as *aequitas judicialis*, 113, 114. Equity as a mode of Interpretation, 114, 115. Equitable construction; Blackstone and Grotius, 115—118. Interpretation: (1) Authentic, 119—121; (2) Grammatical and Logical, 121, 122; (3) Usual and Doctrinal, 123, 124. This Interpretation an intellectual process, 124, 125. Modern Equity, not *laxamentum juris*, 125, 126. Equity as an independent ground of judicial decision, 126—128. Prof. Lefroy's three sources of Case Law, ib. Equity as Justice and Humanity, &c., ib. Equity as Public Policy, &c., 128—130. Custom, in the vague sense, analysed, 131. Savigny, Jhering, Karlowa, Thayer, 132—136. Conclusion. The part of the Judiciary in Legislation, 137—140. The judge's so-called *arbitrium*, 140—144. Special case of International Law, 145—148.

Heterogeneousness of Austin's "Positive Morality." In the Laws, according to Austin, improperly so called, which are enumerated in § 2, p. 61, while it will be generally agreed that the word Law is used in rather a wide and lax sense, I do not think that the mere use of that word would be felt to invoke any very extravagant or out of the way metaphor. On the other hand a strong objection arises at once to the comprehension of very heterogeneous matters

under the one head of Positive Morality, and a great want of discrimination is felt to be shewn in placing them all under the same sanction of General Opinion. (Of course by *general* Austin does not mean neutral or indifferent, but merely "held by the majority of a class": the above objection lies to the neutral word *Opinion* itself.)

At first sight, to those of us at the present day who have not the fear of Bentham before our eyes, not only the ordinary meaning of words but obvious facts of human consciousness would seem to be overridden or disregarded in putting as it were on a dead level such widely different feelings as that which would be styled by most people *moral disapprobation* and that which would be called forth by a breach of the laws of Etiquette or Fashion[1]. But, on looking back into quite historical stages of human developement, and epochs far later than those in which Law first originated, I find it more and more difficult to distinguish, *merely by their subject-matter*, the rules of opinion which we should consider "higher," or dignify with the name of Law, from others which we should not. Some of the most elementary principles of conduct observable in backward races at the present day seem to depend on a vague regard for form and ceremony: in quite recent historical times, among the most civilised nations, the laws of Honour—to some extent those of Etiquette—have attained a working efficiency, with large and influential portions of the community, equal if not superior to that exercised by the ostensible Law of the land[2].

Morality as ordinarily understood. It is not apparently so much in the particular class of human actions considered, as in the character or degree of the feeling brought to bear

[1] Austin[5], 5. 183; St. 65.

[2] See "Gil Blas" and other novels of Le Sage and his contemporaries, *passim*; some novels of Lever; and the present canons of *military honour* in Germany. Modern progress was evidently too strongly put in P. J. p. 194.

on them, at the period under consideration, that we must seek the difference which would at the present day make it a *reductio ad absurdum* to call Fashion or Etiquette a rule of Morality.

It must, in fairness to Austin, be borne in mind that, in his treatment of the subject, he is not speaking of Morality *per se*, and he in fact deprecates the use of the word alone, as compared with Law, on account of alleged ambiguity. His *Positive* Morality means simply rules of conduct defined by the one fact of their dependence on general human opinion. The only recognition by him of any distinction in the *character* of the opinion, producing conformity in such different cases, must be inferred from his occasional admission of a sense in which the word Morality *per se* may be used, as a term of praise, to indicate rules of opinion conforming to the Law of God or "what in effect is the same thing" to the standard of general utility, according, it must be presumed, to the speaker or writer's idea of such standard[3].

The distinctive feeling, in Morality, above referred to, I have, in my former criticism of Austin, ventured to call *absolute approval or disapproval*. It is submitted that Austin's is a misleading and inadequate account of the rules of Morality as they would be understood, and of the motives on which they are obeyed, by most ordinary people at the present day. Some may consciously refer their Morality to the philosophical basis of accordance with their own true or best Nature, some to the religious one of accordance with the will of Heaven; some may advert to a tendency for the general good, whether as the index, suggested by Austin, to the Law of God, or simply as an end directly desirable in itself; few, probably, are without a degree of latent consideration for the approval or disapproval of surrounding human beings. In the ordinary Morality, however, of the vast

[3] See above, § 2, p. 66, and compare Austin[5], 5. 171 with 195 n. *g*; St. 60, 70.

majority of people there is little, if any, conscious motive or reference to standard, but they judge according to the somewhat vague expression "intuitively," in connexion with the general ideas, apparently simple, of Right or Wrong, or the accompanying one of Duty, which depends upon the same distinction considered from a more personal or "subjective" point of view.

Right and Wrong. The particular moral antithesis above referred to exists under the same identical metaphor (of Straight and Crooked), expressed by the same sounds, both in the old Indian and the Teutonic languages, far enough apart in place and time. It is similarly expressed, by words derived from the Latin *directus* and *tortus*, in the Romance languages, French, Italian, and Spanish[4]. In the old Latin this particular metaphor does *not* occur, the notion of Right being otherwise described, as will be pointed out in § 5, and the opposing branch of the antithesis expressed by a mere negation (*ne-fas, injuria*).

The instances here given are all from the circle of Indo-European or Aryan nationalities (see above § 1, p. 9). But a formal distinction of the same kind, though not identical in terms, is by no means confined to this circle. It has recently been shewn by Dr Westermarck, in his "Origin and Developement of moral ideas," that the tendency to arrive at similar expressions of approval and disapproval, and to assort a large amount of conduct under the one or the other category, is widely spread if not universal among the races of mankind. The particular items of conduct classed under the one or the other category may vary almost diametrically in different cases. This diversity has been perhaps the strongest argument against the theory of a Moral Sense *as an index to the Law of God* (see above § 2, p. 66). Moreover, so far as we can judge by the metaphors employed and the words by which

[4] See P. J. pp. 85, 87.

this common antithesis is expressed, it may have begun, as for instance in the Latin and Teutonic languages, with various different modes of admiration or the reverse: but it comes in the end to an approval or disapproval which refers to neither resultant consequences nor original ground, and so is practically automatic or instinctive. The idea, then, of certain conduct as matter of absolute approval or disapproval is one to which, if it is not innate in man, the human mind seems generally to attain.

Butler and the Stoics. In the view of Bishop Butler, whose high authority is deservedly recognised by Austin, such a classification is essential to human nature, springing from a principle of "reflection" universal in mankind, which probably constitutes the main distinction between them and the lower animals. And he claims for this principle of reflection, or conscience, a perceptible authority over other springs of action[5]. Naturally, with Butler, this feeling has a divine source and is a direct index, without any consideration of consequences[6], to the unrevealed will of God. (Of course in any enquiry as to the mental phaenomena of mankind *universally*, or generally, we must leave out of the question *revelations*, which have been, on their own shewing, only *partial*.)

If we look, however, to the practical working of Moral feelings, we find a considerable degree of accordance between those who have recognised a divine Author and those who have not. Perfectly sincere believers in Christianity, or generally in a personal Deity, while they will profess, as

[5] See principally Sermons 1 and 2 "Upon Human Nature."

[6] This is, I think, on the whole clear from the "Dissertation on Virtue" appended to the three Sermons upon Human Nature. See too Dr Whewell's Preface, where he contrasts Paley and Butler. For Austin's attribution to Butler of an intermediate hypothesis compounded of the principle of Utility and Moral Sense, see Lect. 4, pp. 153—155.

their *ultimate* motive to the performance of Duty, the approval or disapproval of the Author of an unrevealed Law, have at the same time admitted, as the *proximate* motive, that of deference to a superior principle in their own nature[7]. And this latter feeling is quite compatible with Atheism, to which the Stoics, in their "life according to Nature" and their austere standard of Duty, certainly approximated. Thus, with Ulpian, Paulus and their school, such ideas as those of the mighty Right and Wrong (*magnum Fas Nefasque*), attested even by the easygoing Horace, are matter of "Nature," apparently self-existent from all eternity, certainly independent of all command, probably of any Deity[8].

The resemblance of these feelings to what I have endeavoured elsewhere (see § 2, p. 51) to define as Instinct is obvious, and indeed the supposed Moral Sense has been regarded as a higher Human Instinct by adherents to the old philosophical Law of Nature and by modern "Intuitionists." But, whatever their remote or hypothetical origin, the feelings in question are surely separated by a specific difference from other decisions of general opinion; they have a real and widely spread existence among human beings, and they do not, as a rule, consciously refer either back to imposition by authority or forward to calculation of consequences.

Modern theories. The social instinct. By a majority, I think, of modern philosophers, and particularly of observers dealing with an extended survey of anthropological facts, the theory of an original Moral Sense is rejected and the admitted widely spread occurrence of Moral standards or judgements is not referred to "an inherent tendency of the human mind,"

[7] See Butler, ll cc., also Sidgwick, Methods of Ethics, iii. 1. p. 188.

[8] Horace, Epod. 5. 87. See on the subject generally P. J. pp. 118, 119, 120 and the passages quoted in the notes.

but regarded as a fairly uniform result of various prehistoric experiences[9].

By some it is regarded as arising, on its more efficacious side—that of absolute *dis*approval—from a specific feeling of *resentment* by *each individual* against interference with his interest or comfort: by others as a consequence of *social needs in general.* From this latter point of view, to which I myself incline, the human tendency towards the formation of moral judgements may be considered as arising from a more fundamental tendency—or perhaps necessity—constraining the human animal, pre-eminently above all others, towards *mutual association*[10]. For it must always be remembered as against rather crude assumptions, by Blackstone and others, that the only state, in which we know Man, is one of some degree of *social union.* When therefore a *state of nature* is spoken of, in which no such union exists, as by Blackstone whose so-called *absolute* Morality pertains to individual human beings with no relation to any others, this "natural" condition of Man would seem to be so completely beyond the pale of experience that any assertions based upon it are worthless. Nor can any greater weight be given to such hypotheses as

[9] See on this subject, however, Jevons' History of Religion, pp. 85—87, and Lang's Criticism in "Magic and Religion," p. 262.

[10] See Westermarck, Origin and Developement of the Moral Ideas, i. pp. 21, 40, 92, 105, 123, &c.: also Letourneau, L'évolution juridique dans les diverses races humaines, ch. 1, Les origines du droit. "La solidarité" as it is well put at the end of this chapter (p. 22) "est proche parente de la justice." On the specially *social* tendency of man, Aristotle, Pol. 1. 2 (Bekk. 1253[a]), *ἄνθρωπος φύσει πολιτικὸν ζῷον* κ.τ.λ.: also Eth. 1. 7 and 9. 9. See too Grotius, de Jure B. ac P. i. 1. 10, 12 and Prolegg. 7—12; and my P. J. pp. 120, 121. In that strange rhapsody, Nietzsche's "Beyond Good and Evil," the distinction in question is a politic device of the servile and feeble against the superior beings (e.g. Caesar Borgia, &c.), to the developement of whom the author casts longing eyes (see ch. 5 on "the Natural History of Morals," Zimmern's translation). In real fact, may not the original Social Instinct have been—not a device—but a necessary preservative, of the future Master of Creation against his brute surroundings?

that of Paley and Austin's "solitary savage"; this being, if occasionally possible, a temporary and abnormal case[11]. I assume that some sort of social connexion in groups, more than mere juxtaposition with each other, is practically universal among all races of men. And it is upon this principle, or universal practice, of Association, but more immediately upon the peculiar character of the Moral judgement which I believe to result from it, that I base the connexion of Morality with Ancient or Nascent Law[12].

Imperative character of moral judgement. Moral judgement, however arrived at or originated, is *absolute*, not a matter of taking counsel with one's self or balancing conflicting advantages, and consequently is, in its intrinsic character, Imperative. As such, it involves an idea of Duty or Obligation, though the Imperative character and the Duty are certainly not conceived as based upon human command, if upon Command at all. The conception of Duty, in particular, being so based is not only repulsive to most thoughtful people but is at variance with the testimony of language. *Debt*, by way of return, is the idea expressed by one class of names in our linguistic group, for Duty[13]: the being *bound* to a person or task that of another[14]. Whence the indebtedness or the metaphorical bond comes—out of what the

[11] See Blackstone, i. 54, 55 and Austin[5], 4. 145—148; St. 45—47.

[12] See § 2, p. 82.

[13] *Debere* is, in my view, rather to have *from* than to *not* have. For the subsequent history of *Duty*, *due*, and the foreign equivalents, I must refer to modern dictionaries.

[14] In δεῖ the idea of *want* or *need* (which undoubtedly appears in old *personal* constructions, e.g. Homer, Il. 18. 100) is probably a secondary meaning, the original one being that of *binding* or constraint. This meaning is obvious in *obligatio*, which word, with the *personal direction* indicated in the compounded preposition, is fully treated in a later section. *Pflicht* apparently means *tendance*, *service* or *promised help*, rather than any idea of bond or command. Χρή *may* indicate Divine direction. Of the more difficult *shall*, A.S. *sceal*, &c., from the Teutonic type *skal*, I propose to speak more fully, if at all, elsewhere.

Imperative character of the Moral judgement has really arisen, are questions to which very different answers will always be given. I have only ventured (above, p. 99) to suggest a solution which may be compatible at once with origination in external or material Circumstances and with a Divinely implanted human Instinct.

Lastly, the idea of Duty or Obligation involved in the Moral Judgement is in a twofold sense *general*. It is not *merely*, nor indeed always, an obligation *towards* some individual to whom the duty is owed (though the Roman *obligatio* may be so confined), but *to* certain conduct *per se*; while, on the other hand, the obligation is regarded not merely as incumbent on one's self but on others also. This latter feeling it is that practically enables the enforcement of rules which grow into Law, by sanctions varying from social avoidance to class or tribe ostracism and outlawry.

Operation of a common conscience. While asserting the intrinsically imperative character of this particular sentiment of absolute approval or disapproval, as distinguished from other human sentiments or "opinions," we must, in the face of obvious facts, admit its failure, upon occasion, to act. It is a commonplace, both of Theology and Ethics, that obedience to the so-called "higher" impulse (see above, pp. 95, 98), as against immediate desires of another character, while it may exist in sufficient force, with many individuals, to guide their conduct quite independently, will scarcely do so, amongst any considerable *class* of people, unless re-inforced by the general sentiment or feeling, to counteract the temptations of the particular case. So, too, the effect of "Divine Law," whether of the unrevealed character discoverable by some such index as those already referred to (above, pp. 66, 97), or as matter of believed direct revelation upon individual minds, cannot be for a moment denied. But we may venture, without the slightest disrespect, to question

the practical or efficient existence of such Law among *classes* of human beings, if entirely detached from any human influence. Neither the so-called Theocracy of ancient times, nor the stronger case of persecuted religious sects in modern are any instance to the contrary. In the former we know that the anger of Heaven was always supplemented by some very material sanction from the earthly community: in the latter there is an extremely strong moral one, in the contempt sure to be shewn, for a renegade, by his late associates and friends.

The unaided motives of a philosophical Law of Nature, or of Utilitarianism, towards the observance of Morality, are certainly, so far as we can judge from experience, not stronger than those of Religion. In the present condition of mankind we may fairly lay it down, that only when the same ideas of Right and Wrong are held by some Society at large, in which men live and to which they belong—and held in a degree of strength amounting to active disapproval on non-conformity—do those ideas attain the substantial and efficient existence to which we might justly apply Austin's term of Positive Morality.

It is in the peculiar character of the individual's "opinion" entertained on questions of Morality, coupled with the general existence of such opinions among a class or number of individuals that their practical force lies. The individual's feeling that certain conduct is Right or Wrong involves not merely distaste, regret, or remorse at contrariety in his own case, but distinct resentment in the case of others. The aggregate feeling of the class or society regards disobedience to its rules of Morality with a disapproval so far active that it is prepared if not directly to interfere yet to assist or tolerate interference with such persons as run counter to those rules.

Morality in early Judiciaries. Upon the Popular

Morality or Common Conscience here described rather than upon mere custom (see below, pp. 131, 135), the original foundation of Law appears to me to rest—certainly not on the fact or fancy of Command by a Sovereign on any one else, except in some cases an imagined or alleged enactment of Heaven. The principles involved are first recognised, for individual occasions, by a Priest, Judge, or Elder, sometimes voluntarily coming forward, sometimes selected by vague popular approval (1 Samuel 3. 20). The declaration and application of principle is enforced or carried out either by the persons directly interested or by some other member of the nascent community, supported by general feeling and, if necessary, assistance. But such declaration and enforcement are certainly not regarded as making any change in the principles in question, which are looked upon as inherently obligatory.

The instrumentality, then, which differentiates Popular Morality into original Law is, according to this view, the administration of Justice, or, to speak more definitely, the habitual or periodic delivery of Judicial Sentences with some continuity of record or tradition: which appears to have been, in fairly well established instances, concurrent with, if not prior to, a general concentration of authority. It is in fact by no means improbable that in the case at present specially interesting to us, of Rome, it was from a priestly judgeship that the historical sovereignty was developed, to which the former function became ultimately subordinate. I shall have to return to this subject in the next section when speaking more fully on the relative priority, in general, of early Law and Sovereignty. It was certainly, at Rome, the corporate succession of the Pontifical Board to which we must attribute the actual drawing up of the formulated rules that constitute the first beginnings of Roman Law.

I can only, in dealing with prehistoric matters, put the above forward as a theory, of which it will probably remain

impossible to establish each point by direct evidence. But it seems to me a more natural one, and more in accordance with later historical record, than the stories of direct legislation by practically despotic power: while, on the other hand, it at least suggests a possible channel for what is somewhat vaguely called Custom viewed as a "Source" of the oldest Law. The general subject of "Customary Law" and the confusion, both of language and principle, which still underlies much of the treatment of that subject, will be discussed towards the end of this section. At present I am confining myself to Morality proper, and to Morality merely considered as the Source or Material (see § 1, p. 23) of Law, apart from any detail as to the *process* by which it is differentiated or developed into Law proper. The individual Modes of this developement will naturally vary amongst different peoples, and at different stages of the same people's history. But I think we may recognise, throughout legal history, a continuing Source or Material of Law in Popular Morality, if that term be taken in a somewhat extended sense, so as to cover, not merely what is, in current opinion, Right or Wrong, but what is Fair and Reasonable or the reverse (below, p. 109).

It must be borne in mind that the present remarks are confined to that quasi-legislative agency of Judges and Lawyers which, whether recognised or not, exists as an indisputable fact long after direct legislation by a Supreme Authority or Sovereign has been fully established.

The feelings and principles, to which I am referring, of course exist also as motives to statutory enactment[15]; but they are here regarded only as grounds for judicial decision or direction, and for such other developement of Law as may be or have been effected simply by professional practice and literature. I wish now to note some indications of Morality

[15] See below on *aequitas judicialis* and *legislatoria*, p. 113.

as recognised by modern Courts, taking English instances, before I come to consider the wider and more varied subject which is covered by the debateable term Equity.

Morality in later Law Courts. One very direct reference to a current standard of Morality may be cited from the practice of English Criminal Law, in the judicial direction given to a jury, on occasion of certain cases where insanity is set up as a defence, to consider whether the accused person knew that his act was *wrong*. For, where such act was in fact legally punishable, his knowledge or ignorance of that fact has been held immaterial, if he knew that what he did was morally condemned by the general opinion of his fellow citizens[16]. The above case, however, is a somewhat exceptional one. A better or at least a more common instance of reference to some general standard of approval or disapproval occurs in those English *Civil* cases where the ground for a new judicial decision (and so for a constituent of future Law) is practically an appeal to current feeling of the time, though somewhat wider in scope than what would be called properly and strictly *moral* (see below, p. 110).

It was long ago laid down by Sir Matthew Hale that where an English judge has neither precedent nor the application and interpretation of existing rules to guide him in deciding a case before him, he is to decide by "the common reason of the thing[17]." This somewhat enigmatical expression

[16] Sir J. Stephen's General View of the Criminal Law of England, pp. 82, 90. Upon this was founded most of the reasoning in my Analysis of Criminal Liability, pp. 62—65. The settlement of such liability by evidence of such knowledge is by no means so definitely stated in the second edition of the General View (pp. 78, 79; see the same author's History of the Criminal Law of England, ii. 163—167): but the propriety and pertinence of the consideration stated in the text does not appear to me to have been shaken. See, for the answers of the Judges in M'Naughten's case, Kenny, Cases on Criminal Law, pp. 46, 47.

[17] Hale's History of the Common Law of England, ch. 4, pp. 67, 68 (Remington). See too P. J. pp. 229, 224.

(which may perhaps be generally paraphrased "a reasonable view of the circumstances of the case") would appear, from the *objective* way in which it is put, to refer not simply to the personal feeling of the judge, but to the judge as representing what is likely to be the view of most reasonable people among his contemporaries. By the "common reason of the thing" we must, I think, understand "common sense" in its old and classical signification[18]—not what seems at present often to be understood by this phrase (i.e. the minimum of intellect capable of estimating consequences), but the general or current feeling of the time. This ground of decision is in fact an appeal to popular Morality in the extended form of appreciating not merely what is right and wrong, but what is reasonable and unreasonable[19].

Equity. Some such idea or principle, as that here attributed to Hale's "reason of the thing," appears to me to be the true basis of the Roman *aequitas* and, in its most general application, of the modern equity[20]. From the many confused and confusing significations which this word has borne, we may begin by eliminating that in which it merely means a particular system or body of legal rules, e.g. those which were long exclusively administered in England by the Court of Chancery (see below, pp. 113, 114). A similar meaning has been claimed for the Roman *aequitas*[21]; but that word, except in very few and late instances, evidently denoted

[18] For this higher or wider form of Common Sense see Horace, Sat. 1. 3. 66, on the *tactless* person, Communi sensu plane caret inquimus, &c., &c.

[19] For the narrower, intellectual, meaning given to Hale's "reason of the thing" by Professor Lefroy see below, p. 127, and on the whole subject of Morality as a ground for judicial decision in England, pp. 128—130.

[20] I should here remark that though reference is occasionally made here, for convenience, to *quotations* in P. J. ii. ch. 15, the *text* has been mainly rewritten.

[21] Austin[5], 33. 576. See however the note, p. 583 and 34. 584.

rather a quality or principle in the administration and origination of Law than a portion or department of the Law itself. I use the term *origination* in speaking of Roman Law, in order to cover, not what is sometimes called *aequitas legislatoria*, as a quality of *any* obviously direct legislation, but the particular case of *virtually* direct legislation, by the Praetor[22].

The aequitas of Austin and Maine. A tempting derivational meaning on the one hand, and a general objection to ideas and names savouring of Morality, in the ordinary sense, on the other, have combined with the authority of great names to obscure a very simple conception of *aequus*, &c., which seems fairly recognisable from the first literary use that we can trace of the words in question. The views to which I refer must be briefly set forth here, because they are often repeated and they involve much that is very questionable both in legal history and juristic principle.

According to Austin, *aequitas*, as used with reference to Law, was at first not a *moral* expression in any sense, but one of historical statement. The word originally, he says, meant *uniformity* or *universality*. Accordingly, when the Praetor "Peregrinus[23]" made his *abstractum*, from the Law of other nations and that of Rome (*jus gentium*), this resultant Law, being uniform or universal, equal or common to all, was called *aequum* from that fact, not from its intrinsic character: but, as it was distinguished by comparative *fairness*, *aequitas* was used, in a secondary sense, to denote

[22] In Cicero's enumeration (Topica, 5. 28) of the constituents of *jus civile*, i.e. Roman Law in general—leges, senatus consulta, res judicatae, juris peritorum auctoritas, edicta magistratuum, mos, aequitas—whatever *aequitas* is, it is distinguished from the *edicta* (see below, p. 111, n. 35). On the difficulty of *res judicatae* see below, § 6, p. 332.

[23] It is as well to remember that this was not the original or proper style of the second Praetor, who came to be the Praetor *qui inter peregrinos jus dicet*. See P. J. pp. 345, 346.

impartiality. The characteristics of this Law, when it was transferred from the Edict of the Praetor "Peregrinus" to that of the Praetor *Urbanus*, were predicated of the Edicts generally, and the term *aequitas*, originally proper to the *jus gentium* only, was applied to the whole system of Law administered by the Praetors, and used as a name to designate the whole *jus Praetorium*; which *jus Praetorium* being not only more impartial but generally more *liberal* than the old Law, *aequitas* was in the end almost synonymous with general utility, and so has been extended, as a vague term of praise, to any system of Law or principle of legislation which for any reason was supposed to be worthy of commendation[24]. For other particular meanings of *aequitas* attributed by Austin to the classical Jurists, several of which will apparently come under the last named very general heading, see below, pp. 110, 111, 112, 137, &c.

Sir Henry Maine's view as to the original signification of *aequitas* was that it designated a process of *levelling distinctions*, e.g. between citizen and non-citizen, agnate and cognate—a process which was probably, he suggests, extremely distasteful to the primitive Roman mind, but was later redeemed from its first ill odour by association with the fascinating Law of Nature[25]. This view, though it no doubt expresses some features of the Praetorian administration—and practical legislation—appears to me, with all respect to its author, to be put out of court by the undoubted early uses of *aequus* in a decidedly favourable sense, whatever was the original metaphor or figure employed in the word (see below, note 34). Professor Salmond takes it that a primitive meaning of physical *equality* or evenness passed of itself into the moral idea of *justice*[26].

Early moral idea of aequus. Austin's genealogy of the

[24] Austin[5], Lectt. 31. 556—561; 33. 576, 577; St. 280—284, 293, 294.
[25] Maine, A. L. 3. 58—61. [26] See Salmond[2], p. 466.

three meanings of *aequitas* given above is, as a matter of dates, impossible. Apart from the particular doubts attaching to a Praetor's *abstractum* from several systems of Law, to the framing of a special edict for the *peregrini*, and to the transfer from that edict to the other, as matters of historical fact, it is certain that the issue of *annual* edicts at all by a Praetor, till after the time of Plautus, must be regarded as improbable[27]. Yet in Plautus' plays we have *aequum* already established in the sense of *reasonable* or *fitting*[28], already used as a half-technical term with the other technical terms of pleading (*orare*) and *resolving* (*censere*)[29] and already coupled with *bonum* as indicating a sort of obligation different from that imposed by Statute Law[30]. Indeed the expression *quantum aequius melius* (= "in the best and most reasonable way possible") peculiar to *arbitria*, though it is apparently quoted by Cicero from the formulary system[31], may possibly date back to the original distinction of *arbiter* and *judex* which is as old as the Twelve Tables[32].

The meaning thus traced to the earliest literary period at Rome is clearly a *moral* one, not merely of general opinion but of general opinion including some notion of approval or disapproval—the important element which Austin omits in his use of the phrase Positive Morality. It is not quite that absolute approval which regards certain conduct as *right*, but a somewhat more mixed feeling, or lower grade of recognition,

[27] See P. J. pp. 347—349 and 365.

[28] E.g. *aequius erat* or *est*, Rudens, 1. 5. 12; 2. 2. 16, &c.

[29] Casina, 2. 8. 64; Cistellaria, 4. 2. 10; Captivi, 2. 2. 51. See too the Senatus Consultum de Bacanalibus (B.C. 186), Ita Senatus aiquom censuit.

[30] Menaechmi, 4. 2. 11. Qui neque leges neque aequum bonum usquam colunt.

[31] Cicero, pro Roscio Comoedo, 4. 11, &c., &c.

[32] Festus, p. 273, s.v. *Reus*: In secunda tabula secunda lege...judice arbitrove reove. In Probus' abbreviations, however, for the *legis actiones*, I only find Q. B. F. quare *bonum* factum, and to this Huschke and Girard object as premature.

for which the best term that I can find is *reasonableness* (see below, p. 136). Derivationally the original signification of *aequum* may have been uniformity or unity[33]. But, as the *moral* meaning is so early established, and that too in connexion with Law, a reference to derivation gives little support to Austin's theory of *universal application* as the first meaning of the legal *aequitas*.

Aequitas in Cicero and the Jurists. For the same reason not much is to be gained by going back to the supposed original idea of *evenness* or *level* suggested by Maine (above, p. 108), as to which I may remark that the *disparagement* connected by him with the word is purely hypothetical. *Level may* have been the first physical meaning of *aequus*[34], but the etymology is doubtful, and the specific idea of *even handed* justice or *impartiality* is not that really expressed in a passage of Cicero which has been passed from hand to hand by many writers without any very exact apprehension of its meaning—*aequitas quae paribus in causis paria jura*

[33] So Skeat, s.v. *equal* (see, however, below, § 8, p. 385 n. 14), and Littré, s.v. *égal*. Pianigiani (Vocab. Etim. Ital.), under *uquale*, compares εἰκός and speaks of *simile* al vero, al giusto: so Prof. Thayer (L. Q. R. xxiii. 178) "*conformity* to Natural Law." But the idea of something to which Equity is similar or conforms, is ages later than the established meaning of *aequus* which *per se* = reasonable. Εἰκός in the sense of *fitting* looks like an original cognate to *aequus* in idea if not in root (see Corssen, Ausspr. i. 374 and Nachtr. 237). Ἐπιείκεια (rendered *aequitas* by Grotius, see below, p. 117) is, coupled with πραότης (2 Corinth. 10. 1) Matthew Arnold's "sweet reasonableness" of Christ. The ἐπιεικής is a mean between Aristotle's complaisant and contradictory man (Eth. Nic. 4. 12). If the *aicetia* of an early inscription (*aicetiai poculum* Corp. Inscr. Lat. i. 43) really indicates, as Mommsen holds, a Deity or personification of *aequitas*, the latter may here quite well mean *unity*, in the sense of social feeling or good fellowship. See also the next note.

[34] "Uxor *aequa* sortes" in Plautus' Casina, 2. 6. 35. may mean "shake the lots so as to be *level*" in the *sitella*. The familiar "Virgin and scales" appears regularly with the legend *aequitas* on Imperial coins from Galba onwards. Coupled with *moneta* this is considered by Cohen (Monn. Imp. iv. p. 9, n. 1) as an indication of *purity*—rather I should say of true weight. For the improbability of any connexion with *aqua* see P. J. p. 365, n. 13.

desiderat. What the writer actually had in view was the substantial identity of a case, which is *not* provided for by statutes, with a case which is[35]. In other passages of Cicero *aequitas* is used more generally to indicate a following of the *spirit* or *meaning*, as opposed to the *letter*, of the Law[36]. On the whole, while his *aequitas* is obviously an *aequitas judicialis*, a quality of the administration of justice or the application of Law, *substantial justice* is rather the idea than *judicial impartiality.* The latter does also occur in connexion with the word, but arises apparently from the general notion of reasonableness or fairness, not from any direct metaphor of *level* or *balance*[37]. *Public* or *general utility* (see above, p. 108) also enters occasionally into Cicero's descriptions of *aequitas*[38], but apparently as a second thought: it corresponds in fact rather to the *bonum* of the old phrase (above, n. 31) than to the *aequum.*

It would not have been necessary to refer so much to Cicero but for the changes that have been rung, and the

[35] The question (Topica, 4. 20) is the application of the statutory *usucapio* of a *fundus* to the case of *aedes.* "As thus understood," says Austin (33. 579), "Equity and Analogy are exactly equivalent expressions." Strictly speaking, he is no doubt right (ib.) in calling this a *spurious* interpretation of the *extensive* kind (see below, p. 115).

[36] See pro Caecina, 21. 59; 27. 77, and de Oratore, 1. 57. 244 (quoted in full P. J. p. 366). In Topica, 5. 28 (above, p. 107, n. 22), what he means by *aequitas* is not clear to me. It *may* be reasonable modification of the law by professionals, generally = Practice, as distinguished from *mos* = Custom. See, however, below, n. 38.

[37] Austin couples two very different ideas somewhat abruptly in Lect. 33. 580. "Equity often signifies judicial impartiality; that virtue which is practised by judges when they administer the Law *agreeably to its spirit or purpose, uninfluenced by extrinsic considerations.*" St. (p. 295) does not mend matters by omitting the *latter* clause.

[38] See Cicero, pro Caecina, 17. 49. Tu qui...verbis controversiam non aequitate dijudicas, et jura non utilitate communi sed litteris exprimis. Cf. Auctor ad Herennium, 2. 13. 20. Ex aequo et bono jus constat quod ad veritatem et utilitatem communem videtur pertinere. In Cicero, Epp. ad Div. 13. 57. causae *veritas* means the *justice* of a case.

strained meanings that have been put, upon two or three sentences of his, detached from their context. His uses of the word *aequitas* are, as Moyle justly observes (Instt. p. 29), popular rather than scientific: but, whenever they turn on juridical matters, the idea of the passages quoted in n. 36 is generally perceptible[39].

So too, in the writings of the Classical Jurists, *reasonableness* and fairness, as opposed to the strict letter, whether of law, legal obligation, or agreement between contracting parties, are clearly the ideas in the main expressed by *aequitas*. This appears, not only in the coupling of *aequum* with *bonum* already mentioned, but in the connexion of both with *bonae fidei judicia* as opposed to those *stricti juris*. The chief feature of the former is that the *judex* takes a wide view of the case pending, so as to embrace all the circumstances, and, as Gaius particularly tells us, the counterclaims of both sides[40]. Many other passages might be quoted, in which *aequitas* varies between the more specific idea *reasonable modification of the letter*, and the more general one of substantial justice[41].

The former would appear to be the meaning more particularly intended in the maxim *aequitas est laxamentum juris* attributed by Austin to Cicero[42]. The reference may

[39] I do not know what is Austin's authority for saying (33. 581; St. 295) that *aequitas* as defined by Cicero is the mere *arbitrium* of the judge.

[40] Ga. 4. 61. Cf. Just. 4. 6. 30, &c.

[41] Modestinus, Dig. 1. 3. 25. Juris ratio aut aequitatis benignitas; Paulus, 28. 5. 85. pr. Et humanius et magis aequitatis ratione subnixum; id. 50. 17. 90. In omnibus quidem, maxime tamen in jure, aequitas spectanda est. In the Basilica *aequitas* is here translated *τὸ δίκαιον*. In a later Constitution (A.D. 315), Frag. Vat. 273, "Prisca legum aequitas" apparently means the true intent of the statutes as against evasions. See too Ulpian, Dig. 11. 7. 14. 13. Et generaliter puto judicem non meram negotiorum gestorum actionem imitari sed solutius aequitatem sequi.

[42] Austin[5], 33. 581. I cannot find the passage in Cicero: perhaps it is a *brocard* founded on the *legis laxamentum* suggested in the pro Cluentio, 33. 89.

possibly be to the work of the Praetors in building up the Edict. By the later jurists, in fact, the function of correcting the hardships of Established Law, as well as of supplying its defects with a view to public utility, is attributed, in so many words, to the *jus praetorium*[43], *aequitas* being spoken of as the principle which suggests the modifications in question[44]. The action, then, of the Praetors in this case might be called, with some propriety, *aequitas legislatoria*[45]; a phrase, I believe, of purely modern invention. So also might *any* direct legislation with the above particular object; though to say that Equity in this sense is merely synonymous with "general utility"[46] is to ignore any proper or specific meaning of the word.

Modern Equity. The point of view taken in the following pages is that of Equity as *aequitas judicialis*, a method or ground simply of judicial decision, whether leading, by way of precedent, to the making of new Law or not. It may be desirable to remind the English reader that such a principle is as real and as necessary in a Court of Common Law as in one called *par excellence* of Equity. This has been recognised more than once by competent English authorities[47]; but the general or "jurisprudential" meaning of the word has been, in our country, somewhat obscured if not obliterated by that of Equity as designating the particular body of Supplementary Law administered in the Court of Chancery. The circumstances which led to a special growth in that Court are matter for a history of English Law rather than a work

[43] Papinian, Dig. 1. 1. 7. 1. Jus praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.

[44] Ulpian, Dig. 23. 3. 7. pr. aequitas suggerit, &c.

[45] Austin[5], 36. 619. See also above, p. 104.

[46] Austin[5], 35. 599; St. 303.

[47] See Austin[5], 36. 619; Blackstone, Int. §§ 2, 3, pp. 61, 62, 92, and Chitty's notes; Spencer's Equitable Jurisdiction, i. 715; Snell, Principles of Equity, Introductory Chapter.

on general Jurisprudence[48]. The division between the two bodies is accidental, peculiar to ourselves; and, since the Judicature Acts of 1873 and 1875, it has ceased to exist as a matter of Constitutional Law, though it practically survives, to some extent, as a convenient assignment of subjects and proceedings to this or that Court[49]. On the other hand the general judicative principles, of which I am now speaking, are in any living and progressive Society an indispensable and universal supplement of Law, from the time that Law is —I will not say embodied in Statute—but is in any way authoritatively formulated and therefore so far limited. "That there must be," says Spence, "in any scheme of Jurisprudence, a system of Equity to correct the positive Law and supply its deficiences all experience shows." The judicative principles referred to may be classed under two heads: (1) Equity as a mode of Interpretation, (2) Equity as an independent ground of judicial decision.

Equity as a mode of Interpretation. The "reason of the thing"—in other words the "reasonable view"—of Sir Matthew Hale and the "reasonableness" which I have shewn to be the general meaning of the Roman Jurists' *aequitas* might appear, at first sight, to be rather a matter of utilitarian estimate or intellectual consistency (see below, p. 125) than a reference to abstract Justice or Humanity. We have however seen that the latter considerations, as well as that of general utility, were taken into account by the Roman Jurists in connexion with *aequitas*; and all three are, as we

[48] A rough sketch given in P. J. pp. 373—377. See, for fuller account, Blackstone, iii. chs. 4 and 27; Stephen[14], v. chs. 4 and 8; Maitland, Equity, Lect. 1 and first two pages of Lect. 2.

[49] See for the subjects specially confined to the Chancery division of the High Court of Justice, Stephen[14], Bk. v. chs. 8 and 9. This, however, is merely a matter of *subordinate legislation*, which might be altered by a simple rule of Court, see Maitland, Equity, pp. 15, 150. For the question how far the "fusion" of Law and Equity might lead to a freer developement of English Law generally in judicial decisions, see P. J. p. 377.

shall see, occasionally referred to in modern English judicial decision (see below, p. 127). At the same time a direct reference to them, though perhaps unduly deprecated by the cautious and the cynical, is but charily made by learned and experienced judges. Their endeavour very rightly is to consider every case with reference to some previously established rule (see below, p. 126). And this, it must be admitted, has sometimes only been accomplished by means of what was an "Interpretation" of the rule rather in legal fiction than in reality. Such a process was known and recognised by the Roman Jurists, though whether under the name of *aequitas* may be questioned[50]. It occurs of course both with reference to statutory and non-statutory Law; but its salient points are most evident in the former, and it is as applied to the former that it is mainly treated by modern writers.

On this subject, which is but briefly referred to in Austin's Lectures, under the heads of Equity and of the distinction between Statutory and Judiciary Law, he has an independent essay or note, worth perusal, which is printed at the end of Mr Campbell's larger edition but omitted in the "Student's." His main point is the distinction between *genuine* or *grammatical* Interpretation, where the expressions of the existing rule are ambiguous, and *spurious* Interpretation, where the existing rule is clear but the Judge either extends that rule to a case which does not come within the letter or excludes a case which does: the former being called *extensive*, the latter *restrictive* Interpretation.

Equitable construction. Blackstone and Grotius. The dividing line drawn by Austin between *genuine* and *spurious* Interpretation is not always very clearly maintained by our authorities. The latter kind seems to coincide pretty

[50] Austin[5], 33. 580, says *aequitas* is so used by Cicero, but confined to *extensive* Interpretation (above, n. 35). For *interpretatio* according to the Classical Jurists, see below, § 7, pp. 356, 357, on *Jus a prudentibus compositum*.

nearly with what used to be known to English judges as "equitable construction"; but the two are somewhat confused in a perplexing passage of Blackstone, often omitted in recent editions, at the end of the second section of his Introduction. I am obliged to give more space to this brief statement than perhaps it intrinsically deserves, because of the broad questions of Interpretation opened up by the authorities to whom Blackstone refers.

For cases where the wording of a Statute is *ambiguous*, Blackstone instances various proper means of *genuine* Interpretation, among which "the most universal and effectual is by considering the reason and spirit of it; or the cause which moved the legislator to enact it." Under the words "reason and spirit" it is clear that he has in mind the Latin phrase *ratio legis*, apparently (though his *or* is conveniently loose) understanding by that phrase the *aim* or *object* of the Legislature[51]. So at least it would seem from the subsequent quotation of the maxim *cessante ratione legis cessat lex ipsa*[52].

Blackstone, however, goes on to an entirely different case from *ambiguity* of expression. "From this method of

[51] For the recognition of this as a proper means of *genuine* Interpretation, and for its ascertainment by circumstances of enactment, preambles, &c., see Maxwell's Interpretation of Statutes[4], 30, 34, 62—66. Celsus' opposition of the *verba* of *leges* to their *vis* and *potestas* (Dig. 1. 3. 17) is quoted by Dernburg, not, I think, very appositely, as an explanation of *ratio legis*, which he himself correctly describes as *Grund*, opposed, amongst other things, to *Veranlassung* the first meaning of which is *occasion*. Bürg. Recht. i. 16, n. 10.

[52] I omit the discussion of this maxim in Austin, as interpreted by him with reference to English *Case* Law, to which I do not now think it was ever meant to apply; see however P. J. pp. 250, 251. It is occasionally used in the interpretation of *Statutes*; see Maxwell[4], p. 66, where *ratio* is taken in the sense of *object*. The case of particular Statute, to which he refers, may furnish a good instance of what is, according to Austin, the more question able use of "spurious interpretation"—that in the restrictive direction—the *ratio* gathered from the preamble being used to restrict "any will" to "a will of land."

interpreting laws by the reason of them arises what we call Equity which is thus defined by Grotius—the correction of that wherein the Law (by reason of its universality) is deficient[53]."

The treatment described in these words, which are all that Blackstone quotes from Grotius, can scarcely be called a *correction* (see below, p. 118). But the original Grotius and *his* original, Aristotle, go further than this. Their *aequitas* or *ἐπιείκεια* (see above, n. 33) deals with cases for which a certain freedom of *exception* must be allowed "because the speaker, if present, would have excepted them." Grotius is, as a matter of fact, speaking of the Interpretation of *promises*, for which elsewhere he admits a "conjectural" Interpretation "beyond the signification of the words," based upon the supposed intent of the promiser[54]. In the passage, however, to which he refers, of Aristotle, what we have described, under *ἐπιείκεια*, are corrections of *Law*, which the legislator would have made, if present[55]. These seem clear cases of Austin's "spurious" Interpretation by a presumed intent

[53] Blackstone, Int. § 2, pp. 60—62. That neither this use of the word Equity nor the various maxims on the subject introduced by the phrase "it is or hath been said" do really coincide with the practical lines of demarcation between the two English jurisdictions is elaborately pointed out elsewhere by Blackstone himself. See Bk. iii. ch. 27, pp. 429—434; Stephen[14], Bk. iii. ch. 8; Maitland's Equity, pp. 12, 13, &c., &c.

[54] Grotius, de Jure, &c. ii. 16. 26. 1, and 16. 20. 1. "Beyond" (*extra*) ought perhaps rather to be "varying from," as Grotius expressly deprecates extension of a *promise*.

[55] Aristotle, Nic. Eth. 5. 14 (Bekker, 1137[b]); see too Rhet. 1. 13 (Bekker, 1374[b]). Most of the passages in point are given in full at P. J. pp. 236, 237, notes 42, 43. This presumed intent of the Legislator is scarcely an appeal to *morality*, though the latter may to a certain extent come in as matter of "good faith" in the case of the promiser. On the introduction of *conscience* and *justice* into English Equity, as distinct from the intellectual processes of Aristotle, through the reading of the Greek philosopher by the philosophical Canonists, rather than from the original, see Prof. Vinogradoff's interesting paper on Reason and Conscience in Sixteenth Century Jurisprudence, L. Q. R. xxiv. pp. 374, 377, 379, 381, 383. See also below, pp. 141, 142.

of the legislator, such presumption being an inference from the altered circumstances of a later time.

The *primâ facie* objections to this manipulation of a clearly expressed rule of Law—particularly, perhaps, when in the *restrictive* direction[56]—are obvious, and have not only been urged with characteristic vehemence by Bentham[57], but have had such weight with modern English judges that the so-called "equitable construction" of a clearly expressed Statute is treated by Maxwell as almost a thing of the past[58].

The very limited application of the principle of Equity quoted from Grotius by Blackstone (above, p. 117)—Interpretation of Law, where all that is done is to supplement the deficiencies necessarily attaching to any general rule or statement—does not present any great difficulty. It is fairly covered, I think, by Maxwell's "Beneficial Construction" (ch. 2, § 2). The real "corrections," on the other hand, suggested by Grotius himself and Aristotle, amounting as they do to recognitions of the changed feeling belonging to a later time than that of the legislator, practically treat Equity as an independent ground of judicial decision. Before coming to that subject, however, I would point out some distinctions in Interpretation of Statute Law (see above, p. 115), recognised in countries which have not retained *our* occasionally convenient substratum of an elastic "Common Law" to build on (see Willes, J., cited below, p. 128), but expressly depend on the Interpretation of Codes purporting to be all-comprehensive.

[56] Austin[5], 33. 580, and other passages cited in P. J. p. 239, n. 54. Which, however, of the two "spurious" Interpretations really is the more objectionable, or admissible, would seem to depend on the nature of the particular law. See the remarks of Dr Grüber in his Lex Aquilia, Int. xvii., xviii. *Promises* are of course, as Grotius intimates, more readily *restricted*.

[57] Traités, i. 244, 245; Theory, p. 155. The alleged offenders are the Roman Lawyers; but the lash is meant for an English back, of a certain Vinerian Professor.

[58] Maxwell[4], ch. 9, § 2, pp. 384—390.

Interpretation. 1. Authentic. The distinctions which I now come to consider are primarily derived and explained from the System of Savigny, who had before him the present French Code but only the old Prussian and Austrian Systems. He is still of course, and always will be, an authority of the highest value. His views, however, must now be taken with some modification owing to the change in legal Systems and Codes which has supervened since his day—notably the recent German Codification. My principal authorities for the present German doctrine are the Articles by Mitteis and Gierke in the 1904 edition of Holzendorff's Encyclopädie der Rechtswissenschaft and the introductory part of Dernburg's Bürgerliche Recht des Deutschen Reichs[59].

Authentic Interpretation is distinguished from the other kinds rather by its author or juridical Source (see § 1, p. 21) than by its subject-matter or mode. The rule in question may or may not be obscurely worded: but the sense which it is henceforth to bear is prescribed *by the Legislature*, and the result is in fact not so much Interpretation as fresh Legislation[60]. The simplest case, which requires no further remark, is that of an independent statutory reform of existing statutes; but the same effect may of course be produced through a general ruling by the Legislature, in connexion with the judicial decision of a particular case—a not uncommon form of the Imperial Constitutions in the later Roman Empire (see below, § 6, p. 334). There is a somewhat heterogeneous class of cases which lay between Authentic Interpretation in its strict sense and what we shall shortly have to consider as Usual. These appear mostly to arise where the rule, under

[59] Savigny, System, i., specially §§ 32 and 35; Holzendorff, i. § 4 (*Auslegung*) of the *Zivilrecht*, by Mitteis; Gierke, ib. on *Gewohnheitsrecht* and *Juristenrecht*. The part of Dernburg's work referred to is Vol. i. (*die allgemeine Lehren*) of his Bürg. Recht. I have also used Scherer's Allgemeiner Theil (B. i.) des Bürgerlichen Gesetzbuches.

[60] Savigny, i. § 32. 209; 35. 224.

which a judge has to decide, is really obscure or inadequate.

The old *arrêts de règlement* of the French *Cours Souveraines*, which date from the 13th century, were general resolutions to be observed as laws within their respective provinces. Whether connected or not with the decisions on particular cases, like the Roman *decreta* above referred to, they were in legal theory matter simply of Interpretation, and liable to be quashed (*cassés*) by the *Conseil du Roi*, for violation of *Ordonnances* or *Coutumes*. In strictness, therefore, they can scarcely be reckoned as matter of Authentic Interpretation. In the course of the French Revolution (1790) a new *Tribunal de Cassation* was established as a Supreme Court, but without any power of Interpretation by way of *arrêts de règlement*: the only *décrets interprétatifs* were to be given by the proper Legislative Body[61]. This is in accordance with the general prohibition of any judicial decision being delivered in general or *regulatory* terms. Savigny however shews how, by subsequent legislation, any grounds repeatedly relied on by the new *Cour de Cassation* for quashing a decision thereby acquired the character of general Law[62]. In the same section he deals with other cases in the German systems of his time, where, in doubtfulness or deficiency of an existing rule of Law, a Judge might refer to a Legislative Committee and decide in accordance with their ruling, or rely upon the nearest analogy that he could find in existing rules, or upon general principles of the Law, or even upon natural principles of Jurisprudence, signifying however the present doubt or deficiency with a view to its removal by Legislation. The first of these proceedings, which comes nearest to the Roman

[61] Brissaud, Droit Français Public et Privé, i. 375, 876, 991.

[62] The above prohibition is Article 5 of the Titre Préliminaire to the Code Civil. The treatment of this and similar matters by Savigny is in System, i. § 51. See particularly here, pp. 327, 328.

Imperial Practice, was due to Frederic the Second of Prussia, but was abolished in 1798. The others, which include the later Law of Prussia itself, did not directly result in any Authentic Interpretation[63].

The present German Civil Code has no direct enactment on the Interpretation of Statutes, which is left as matter of science (*Wissenschaft*) or Jurisprudence. There is no allowance of reference to a Legislature or legislative Committee, and although the penal enactment of the Code Napoléon, for refusal to deliver judgement on the ground of silence, obscurity, or insufficiency of the Law, is not adopted, the ruling principle certainly is, upon which that enactment was based[64]. The "general principles of the Law" with which the Judge must content himself since the abolition of Frederic's law, in Prussia, have not quite the wideness of the corresponding Austrian "natural principles of Jurisprudence" (Savigny, in note 63). But the result is very much that recognised in the French Conferences and by the French Commentators on their Code[65]; viz. that there must be some cases (and more, of course, under a Statutory than under a Common or Customary Law) in which a Judge will have to decide in accordance with "good sense," "the simple light of reason," "natural Law" and "natural Equity." I will not however anticipate by entering here upon a larger field than that of Authentic Interpretation, as including the absolutely unprovided cases contemplated by Sir Matthew Hale (above, p. 105) and including Equity, in its widest sense, as an independent ground of judicial decision (below, p. 126).

Interpretation. 2. Grammatical and Logical. Authentic Interpretation is now, as we have seen, pretty strictly

[63] Savigny, l.c., pp. 328, 329; Dernburg, i. pp. 14, 15.

[64] The enactment referred to is Art. 4 of the Titre Préliminaire. See Scherer, i. p. 7.

[65] See Laurent, Principes du droit Civil, i. §§ 254, 256, 257; Locré, Esprit du Code Napoléon, p. 156, &c.

confined to voluntary and independent action of the Legislature. The Judge is left free, and bound, to form his own Interpretation of the existing rule. For this he is expressly allowed, by modern Statutory and Jurisprudential authority, a liberal choice of material and process, going far beyond that mere supplementation of the necessary generality of expression in a Statute of which Blackstone speaks (above, p. 116); the process being mainly, in fact, a matter of inferences and conclusions. This Interpretation is what is termed *logical* as opposed to *grammatical* or literal; and it is by no means clear that its principle is not extended, at least by German authorities, to cases where there is *not* the justification of ambiguity (see above, p. 115). For their *logical* Interpretation not only takes into account, as a matter of course, the antecedents, the history, the legislative object, &c., of a Statute, as well as the words; but it is also employed so as to *extend* the application of the law from cases which fall within its words to similar cases which do not[66]. With the ultimate general principles upon which the Judge has to go in the last resort, we have to deal, as has been said, elsewhere.

The wide meaning above allowed to *logical* Interpretation differs from the same expression as used by Professor Salmond, who puts somewhat the same idea in a more definite form, to which I shall return shortly. At present we must pass on to the explanation of two other descriptions of Interpretation

[66] See above, pp. 114, 115, as to *ratio legis*. Dernburg (i. pp. 16, 17), who makes *logical* Interpretation to consist mainly in taking the Statute under consideration in connexion with "the whole body of the Law," notes a rather divided opinion as to the use, for Interpretation, of such *Materialien* as drafts (*Entwürfe*), memorials (*Denkschriften*), &c. See further on the subject Mitteis, Holz. Enc. i. 304—306; Gierke, ib. 445; the *Einleitung* to the former Prussian Gesetzbuch, § 53 (also Savigny, i. §§ 49—51, especially p. 328, n. *e*), and the Italian Codice Civile, Tit. Prel., Art. 3. The principle of Analogy stated above is explained in an unusual and technical way by Mitteis, as being ἀνὰ λόγον, i.e. secundum *rationem* legis. The Greek phrase is generally understood to mean *in proportion*.

or, what is more important, the principles and practice which they now represent.

Interpretation. 3. Usual and Doctrinal. An Interpretation of previous Statute Law is said to be *Usual* when it depends on what has been vaguely termed Custom (*Gewohnheit*) with which, however, Dernburg very properly couples *Gerichtsgebranch* Court Practice[67]. Custom, in the German Jurisprudence to which I am now referring, has apparently undergone some change not only as to the admission of legislative force but as to the meaning of the word. In former times it was regarded, primarily and properly, as *National* Custom and, as such, was credited with a distinct and intrinsic legislative character. This at least seems to be the best explanation of *usual* and *authentic* Interpretation being coupled together under the common name of *legal*, and together opposed to Interpretation of a Scientific or *doctrinal* character as non-authentic[68].

Now, according to the view elsewhere adopted in the present work (see § 7, p. 350, § 8, p. 379) Custom generally *must* have passed through some professional recognition or treatment before we can conceive of it as Law: in fact Savigny himself admits that the alleged *usual* Interpretation is practically a *scientific* or *professional* one.

But the professional element takes a more definite place in *Gewohnheit* as regarded in the present German system. Custom was, in the first sketch of the new Statute Book of the Empire, to have been expressly abolished, as a source of Law, altogether. That project, however, being silently dropped, Custom is represented by Mitteis (l.c.) as resuming

[67] Compare Savigny, i. § 32. 209, and Mitteis l.c. 305, with Dernburg l.c. p. 17. The confusion no doubt comes in the first instance from the *Consuetudo aut rerum perpetuo similiter judicatorum auctoritas* of Callistratus, Dig. 1. 3. 38. See below, § 6, p. 333.

[68] Savigny, System, i. § 32. 209. Dernburg speaks of *authentic usual* Interpretation, l.c. pp. 15, 17. See also P. J. pp. 218, 231.

its old power. At the same time, this statement is accompanied by the important limitation of the modern Customary Law to a matter not of mere fact (*faktisch*), but of Scientific and professional constitution or recognition. And among the means of such recognition (*Erkentnissmittel*) are enumerated by Gierke[69], in the very first place, *Litteratur* and *Präjudizien*. By the latter are specially[70] meant *judicial precedents*, which are sometimes associated with other Court elements of Law under the general name of *Praxis*: by the former must be understood the scientific (*Wissenschaftlich*) writings of Jurists. This *Wissenschaft*, as it is briefly called, is equivalent to the older "doctrinal Interpretation."

I must, however, avoid anticipating the fuller discussion of Case and Text-book Law in later sections (8 and 9), and shall conclude the subject of *usual* Interpretation with the note that, in this case, a professional literature, very nearly corresponding to the Roman *jus a prudentibus compositum*, is found to be treated on the Continent as practically on a level with Precedents, or more generally Practice, both being often combined under the term *Jurisprudenz* by German writers.

The above Interpretation an intellectual process. What has been said hitherto applies more directly to Statute (see above, p. 115); non-Statutory Law, however, whether in the form of Custom, Practice or Precedent, is of course equally open to the process of Interpretation, or rather of a freer treatment which can scarcely pass in strictness under that name. In both cases it must be remembered, in conclusion, that anything which would be considered an "Interpretation," properly so called, of existing Law, whether by way of genuine

[69] Holz. Enc[6]. i. pp. 444, 445. On some difficulties involved in this statement see below, § 8, pp. 407—409.

[70] In apology for this "meticulous" adjective I must urge the ever recurring ambiguities in meaning of Praejudicium, &c. (see below, § 6, p. 332, § 8, p. 403).

explanation, extension or restriction, is rather an *intellectual* process than a reference to *moral* feeling, in any ordinary sense of the word moral. This is obviously true as to the bringing of some newly arisen variety of case under a wide early generalisation "deficient by reason of its universality" (see above, p. 117). Early generalisations, if made at all, are very brief and crude; more often the original rule is only expressed as to some one particular combination of circumstances, by their analogy to which, more or less close, a new class of combinations have to be brought within judicial cognizance. And, after all, there will still be, from time to time, some absolutely unprovided cases, that must either be dealt with by Equity in that different sense which we come last to examine (as recognised by the French Jurists) or by that somewhat vague German conception "the general principles of the Law" (see above, p. 121). So long as the term Equity is confined to a real or plausible Interpretation of particular existing Law, it may no doubt be, for the most part, considered, as Austin represents it, equivalent to Analogy[71]. But Equity as an independent ground of judicial decision (see above, p. 114) differs altogether from the intellectual process hitherto under consideration.

Modern English Equity not laxamentum juris. The distinction just stated is well marked in a rule laid down by Professor Salmond for the Interpretation of "Enacted Law" or Statute, which would, I think, now be universally accepted, and is also capable of a more general application.

Where the letter of the Law would give a meaning *logically* inconsistent or incomplete, he holds that an intention of the Legislature may be *presumed*, differing from that which appears on the surface, and such dormant or latent intention should be ascertained and put in effect.

[71] Austin[5], 33. 579 (omitted in St. 295). The term Analogy is here used in its ordinary sense, not in that of Mitteis (above, n. 66).

But, to correct clear Statute Law on *ethical* grounds, would certainly be no longer tolerated, though the practice was not only followed but avowed by old English judges, e.g. by Coke and Hobart[72]. The "Equity" which consists in a *laxamentum juris*, and which, whether nominally adopted by the Roman jurists or not, was truly descriptive of the *jus praetorium* (see above, p. 113), could not be claimed, Blackstone shews[73], as a special characteristic of our *Courts* of Equity. It was, no doubt, at one time, a principle admitted and occasionally acted on by Common Law judges as well. But at the present day, if a rule of established Law is clear, logically consistent, and complete, a judge, certainly in England, will consider himself bound to decide accordingly, whatever the hardship or moral scruple to which it may give rise. Equity in the wide meaning which the maxim *Aequitas est laxamentum juris* suggests, as equivalent to Justice, Humanity or General Utility, only now, I think, comes into play for what may be regarded as absolutely "unprovided" cases.

Equity as an independent ground of judicial decision. It is pointed out by Professor Salmond, at the outset of his valuable work on Jurisprudence (§ 7), that the widest and most fundamental duty of a Judge is to administer Justice—of course in accordance with established rule and recognised precedent, but, after all, Justice—not merely Law.

The difficulty supposed by Sir Matthew Hale, where

[72] Salmond[2], pp. 138—141. Much the same reasoning, though not pressed to quite so definite a conclusion, appears in Laurent's Principes du droit Civil, i. § 274. See, on the same subjects, Maxwell[4], chs. 8 and 9, particularly the last page or two (392, 393).

[73] Blackstone, iii. p. 430. The evasions of the hardships of feudal tenure in the earlier land law (see Maitland's Equity, pp. 26, 27), belong to one Court as much as to the other. The origin of our Chancery Jurisdiction in prayer to the king for "extraordinary" relief differed from the general maxim *aequitas*, &c., in its personal and individual application. Maitland, Equity, pp. 4, 5. See, however, below, p. 141.

direct application and interpretation of existing Law alike fail, is no doubt less likely to occur in modern times, at least in countries like our own, with a continual accumulation of recognised precedents. But there will still be found occasional cases in the future, as there have been many in the past, where final recourse must be had to the "reason of the thing," which, I have endeavoured to shew, generally means a reference to some popular standard or ground *not* legal. An interesting and valuable collection of instances, coming down to a few years ago, in English Law, was published by Professor Lefroy of Toronto in the Law Quarterly Review for 1906. In his two articles on the subject three "primary sources of Case Law" are specified: 1. Justice, humanity, and other moral obligations; 2. Common sense and the reason of the thing; 3. Public convenience and other practical considerations[74].

The cases classed under one or other of the above heads involve questions of English Law in considerable detail. Into this I shall not enter, beyond some short reference in notes, as I am now merely citing the general conclusions arrived at by an evidently well read and philosophical writer, in support or illustration of the principles here maintained.

We may first dispose of the decisions placed by Prof. Lefroy in the second of the above classes, to which he appropriates Sir Matthew Hale's phrase, in a merely intellectual sense, somewhat short of that in which it has been taken above (p. 106). Most of the cases quoted under this head appear to be decided by "indirect authority and analogy"[75], and in strictness to belong rather to the subject of *logical* Interpretation, than to be truly precedent-making. Those, on the other hand, which belong to Professor Lefroy's

[74] L. Q. R. xxii. p. 296.

[75] ib. p. 303, n. 3. See also above, p. 125.

first or third class, stand on an independent footing and require independent notice. For a considerable amount of English Case Law, not matter of Interpretation in any sense, but purely Judge-made, is successfully shewn by him to be based directly upon the principles above stated. I add in a note[76] some of the most striking instances falling under the first head. They are subject, it will be seen, to much qualification; but I think on the whole the learned author is justified in his guarded conclusion: that obligations based simply on justice, humanity, and morality *may* carry with them legal rights and liabilities, if judges, balancing considerations of justice and right with those of public convenience, practical expediency and common sense, decide that it is well to give them efficiency.

Public policy, otherwise "public convenience and other

[76] See L. Q. R. ib. p. 303. In the old case of Millar and Taylor (4 Burr. 2303) it was laid down by Willes, J., that "Justice, moral fitness and public convenience, when applied to a new subject, *make Common Law*, without a precedent." This statement is, however, much qualified by Pollock, L.C.B., in 4 Clark's House of Lords cases, p. 936, where he holds that the above principle must be limited to imposing new *prohibitions* of what is injurious, and not allowed to cover the *creating* of new *rights*. "It is not the function," says Lord Macnaghten, "of a Court of Justice to enforce moral obligations which do not carry with them legal or equitable rights," Blackburn, Low & Co. *v.* Vigors, L. R. 1887, 12 App. Ca. 543.

In Queen *v.* Instan, a very cruel case of neglect and ingratitude, Coleridge, C.J., after stating that there was no case directly in point, went on to speak of a legal duty arising (as I understand him) simply from a moral obligation: and the presumed legal duty was unanimously held by the Court sufficient to constitute criminal responsibility for its disregard, L. R. 1893, 1 Q. B. 450. This decision might (*semble*) have been based directly on *legal duty* incurred by *taking charge* of a person, alleged in Stephen's Digest of Criminal Law Act, 213, p. 135. (See R. *v.* Marriott, 8 C. & P. 425.) That does not, however, seem to have been the Chief Justice's view, or Professor Kenny's, to judge from his emphasis on the word *wicked* in Outlines of Criminal Law[5], p. 122.

In the very recent case of Bradford Corporation *v.* Farrand, L. R. 1902, 2 Ch. 665, Farwell, J., bases his refusal of an action, in the absence of any direct law or legal precedent, expressly on grounds of *aequum* and *bonum*.

practical considerations" which are, in the words last quoted, treated rather as a *check* on the *moral* grounds of judicial decision, are under Professor Lefroy's third heading (above, p. 127) recognised on an independent and positive basis of Case Law. Elsewhere, the two appear to be taken together by him as recognitions of *lay practice*. In my mind, a merely *neutral* idea, in point of Morality, is expressed in the last phrase, and one which ought to be distinguished from the comparatively positive common feeling of Right or Wrong: a distinction which, I shall endeavour to shew, is often ignored, under a general and vague use of the terms Custom and Customary Law; just as Austin ignores ordinary feeling and meaning under his general heading "Positive Morality" (see above, p. 95). At present I confine my remarks to Public Policy.

Public Policy has been expressly objected to, as a ground of judicial decision, "except where it means the policy or principle of the established Law[77]": which it certainly does *not* usually mean, but is rather equivalent to Austin and Bentham's "general utility." It is, according to Burroughs, J., an unruly horse: once astride, you do not know where it may carry you to[78]. In the particular case of Contracts alleged to be void because against Public Policy a later and much greater judge (Jessel) entered a strong caution against the extension of such a principle[79]: and still more recently we have a general judicial dictum that "a series of decisions based upon grounds of public policy cannot possess the same

[77] Parke, B., in Egerton *v.* Earl Brownlow (1853), 4 Clark's Ho. Lords' Cases, 123.

[78] Richardson *v.* Mellish, 2 Bing. 252.

[79] Jessel, M.R., in Printing &c. Co. *v.* Sampson, L. R. 1875, 19, Equity Cases, 465. On this questionable employment of the principle of Public Policy and its great subsequent extension both in Judicature and Legislature see an article by Mr T. Beren in Journal Soc. Comp. Leg. viii. (1907), pp. 193, 194.

authority as decisions which deal with and formulate principles purely legal." All this is undoubtedly true and particularly so in the very questionable restriction of Contract or contracting power: but the general conclusion to be drawn, both from the case last cited and the previous decision in the Chancery Division which it confirmed[80], appears to me to be —not so much that considerations of Public Policy are improper grounds for judicial decision, as that they are proper grounds, but such as must continually vary according to changing conditions of industry and commerce.

An instance of new or changed Law, the growth of judicial decisions based on considerations of general utility, may be traced in the much modernised English doctrine as to the servitude of Ancient Lights. And we may conclude with a model encomium on judicial Legislation in the words of a very advanced legal thinker, on a well-known legal case, by which an important question of "public policy" was decided.

Cockburn, C.J., in Wason *v.* Walter, speaking with reference to the gradual developement of the English law of libel said: Whatever disadvantages attach to a system of unwritten Law, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied[81].

[80] The words are Lord Watson's in Nordenfelt *v.* Maxim & Co., L. R. 1894, Appeals H. L. (E.) p. 553. In the previous case, Maxim & Co. *v.* Nordenfelt, L. R. 1893, Chancery 1, see particularly Bowen, L.J., 665, 666; also the remark of Fry, L.J., in Davies *v.* Davies, L. R. 1887, 36 Chancery Division, pp. 396, 397.

[81] L. R. 1868, 4 Q. B. p. 93. This is, however, like that of Farwell, J., cited above (p. 128), unusually bold language. The more ordinary form, even of a real advance in judicial legislation, is to discover an *analogy* between facts now for the first time before the Court, and previous decided

Custom, in the vague sense, analysed. Having ventured above (p. 127) to question what appears to me a somewhat vague reference to Practice, by Professor Lefroy, I shall now endeavour to clear up, if possible, some difficulties arising from a perplexingly wide meaning given, by almost a majority among jurists, to the term Custom. We may begin by leaving out of the question so much of this vague "Custom" as can be plainly recognised to be matter of Practice, in the sense of purely *professional* usage. I admit the difficulty of drawing an exact line, and, as will be seen hereafter, am disposed to agree with the view that all so-called Customary Law must generally have passed through a stage in which it may be said to have been *a prudentibus compositum*, put in form by professionals (see p. 123 above).

But what I wish to discuss here is the so-called source, the prior material or inchoate Law, which goes by the name of *jus moribus constitutum*, as distinctly neither attributed nor attributable to professional authors. I wish to shew that there are, in this, *two* different elements, which we may at least distinguish with advantage, though it be granted that there are points, or rather stages of human developement, where the one passes very easily into the other.

Again we may leave out of the question, or postpone for very brief subsequent treatment (§ 7, pp. 346, 347), Julian's time-honoured *dictum* which bases the alleged existence of Custom, as Law, upon a pretended equivalence of tacit consent by a People, to their legislative enactment. A common feeling, or, at least acquiescence, and, when occasion arises, a corresponding usage, would not now be compared, even by

cases; or to frame, by *induction* from such previous cases, a hitherto latent principle of Common Law which will cover the new one. See L. R. 1883, 11 Q. B. D., Brett, M.R. (Heaven *v.* Pender), 509 and (Munster *v.* Lamb) 600, also Fry, L.J., ib. 607. See too Clarke *v.* Army & Navy Cooperative Society, L. R. 1893, 1 K. B. 155.

those who most definitely claim for Customary Law an independent existence, with a national vote.

Savigny, Jhering, Karlowa. I shall therefore confine myself at present to the investigation of the purely Customary element in so-called Customary Law, with special reference to the theory of the latter put forth by its great modern supporter Savigny and to the later criticisms of Savigny by writers of his own race and language. It is in the German treatment of this subject that we find the greatest amount of suggestive matter and, at least to an ordinary English mind, of ambiguity. For, in the German legal terminology we have still the identity of name, lost to us English, though existent among our Saxon ancestors, for individual Rights, Right in general, and Law. And, although the equation of the two last furnishes an important psychological argument, it leaves us often in great doubt what the writer exactly means.

To come, however, to our authorities: In a sort of genealogy of Private Law given by Savigny at the beginning of "his System," we have individual Rights, with the Relations of Right in which they have their root, and the Rule of Right which governs them, all derived from some ultimate *Institut*, which I can only translate Principle. And these original Principles of Right (*Rechtsinstitute*) are represented as constituting *positive* (? actually existing) Right or Law, which has its being in the Common Consciousness of the People[82].

There are some intermediate stages or generations, in this chain of connexion or descent, which appear rather gratuitous. But it is worth while to consider how far Savigny's theory goes upon the same ultimate principles as that of the critic who seems to carry greater weight at the present day than even he.

Jhering, with more direct reference to Roman tradition,

[82] System, i. §§ 5—7, pp. 7—14. See too §§ 52, 53 and Puchta as quoted by Karlowa, i. 448.

bases, it is true, the first individual Rights upon Physical Might, and their assertion upon Self-help. But he, too, in this prehistoric stage (which seems at first sight Hobbes' Natural state of War)—a stage conceived as prior to any organised administration of Justice—has to assume a "feeling of Right" in the Community throwing its preponderance on the side of the individual wronged, and so raising his bare physical force to a Moral (*sittlich*) Might, or, to speak more practically, "as a people's Justice, bringing into recognition an outraged people's Morality[83]."

When, however, Jhering comes to a closer scrutiny of the theory of a Customary Law (*Gewohnheitsrecht*) he draws a distinction, not drawn, at least with any clearness, in the passage last quoted, between Right, as the source or material of Law, and Morality. He now[84] appears to recognise, as from the very beginning, a real distinction between what is *rightfully* and what is *morally* obligatory, but a confusion or indistinct demarcation between the two in the minds of most early nations. This confused state, or idea, should, he says, be clearly opposed, under the, to us ambiguous, name *Sitte* (Custom *or* Morality), to Right meaning Law proper; and the indefiniteness, which must necessarily result from the variances of feeling in the private individual or even in the Judge, he stigmatises as the "ineradicable *Mother-mole*" of the most concrete Customary Law. In spite, however, or rather in consequence of this defect, he admits the great importance that must be allowed, at the beginning, to the Administration of Justice (*Gerechtigkeit*); which, in his view, loses its high recognition, and its requirement of exceptional ability, in later times; as Right (or Law proper) gains its victory over the state of mere sentiment or feeling, through the means of

[83] Geist des Römischen Rechts, i. 120, 122, 175.

[84] Geist, ii. 1. § 25 (the earlier part mainly, pp. 33, 34). See too Karlowa, i. § 58, pp. 448—451.

Statutory Enactment (l.c. pp. 35, 36). The same alleged struggle is redescribed in the earlier part (ch. 1) of Jhering's *Kampf ums Recht*, a brilliant essay, in which, though mainly dealing with the individual citizen's struggle to maintain his "Subjective Right" or "Concrete Rights," the author pauses on his way in order to deliver one more swashing blow at Savigny's theory of "Objective Right," i.e. Law as based on Custom.

The work done, by the Administration of Justice, in forming Law, is so continually dwelt upon in these pages that I need not say how thoroughly I agree with Jhering's admission of its importance. I would only at present take exception to the idea of that importance being confined to early times, or dying away into Statute in later. For the rest, in spite of his hard words, I would hope that I am in fact rather *with* Jhering than with "indiscriminating visionaries" (*bei Schwärmern und Urtheilslosen*) in maintaining that there *is* a "feeling of Right" common or widespread, if not innate in Man, as an animal naturally coalescing into Peoples or Communities, upon which the greater part of the developement of old Law depended and much of the developement of modern Law still depends. On his view as to the *manner* of such developement see below, p. 137.

The fundamental and original difference, alleged by Jhering between "Right" and "Moral," is really a difference between Morality strictly so called, which deals with the Apprehension of Conduct as Right or Wrong, and the various lower degrees of approval, disapproval or preference which sometimes, e.g. under the name of Equity, approximate very near to the former and sometimes come far short of it—for instance in the following of mere Custom, on matters which would be recognised as, to use the modern phrase, "morally indifferent." This difference is, I think, in principle accepted both by Savigny and Jhering, though their expressions are often, at

least to me, ambiguous from the introduction of the doubtful term *Sitte* (above, p. 133). But it seems to be often disregarded by some of the later writers on *Gewohnheitsrecht*, particularly when dealing with Roman Law; where the confusion referred to is, however, to some extent excusable, from the scanty and fragmentary *dicta* of the Roman Jurists and their various uses of the word *mores* (see § 7, p. 344).

Thus Karlowa speaks of a Consciousness or feeling of Right, a "conviction of its necessity" (according to the old phrase *opinio necessitatis*), as existing in the individuals of an association simply connected by the similarity of the relations in which they live, but regards this feeling as requiring an indefinitely long usage to ripen it into Customary Law[85]. The true origin of Law, as to be found in association depending merely on common facts of race, locality or mutual intercourse, not necessarily in union under a Sovereign, is here well noted. But the peculiar *imperative* character, in virtue of which ideas of Right and Wrong form the first basis, or material, of Law, is not sufficiently distinguished from preference in matters simply of Custom.

The former ideas, whencesoever originally derived, have, I submit, almost universally attained a developement of power and general influence which is not referable to usage any more than to command (see above, p. 98); and the general approval or disapproval connected with them is different both in kind and degree from that attaching to the rules of convenience or expediency which constitute Custom proper.

Thayer on Custom. The same confusion, as it appears to me, of different mental phaenomena, is observable in a very emphatic and explicit theory recently put forth as a "general truth" on the growth of Law by Mr A. S. Thayer of Harvard.

[85] Karlowa, i. § 58, pp. 448—450. The phrase *opinio necessitatis* seems to be used in a rather different sense with regard to modern Customary Law (see below, § 8, p. 405).

Law is based, according to him, on *habit*—the habits of the average man. "Habit gives him a certain momentum along the course of Custom, which we call his natural disposition, and this disposition works for the making of Law based on habit. Consciousness of this disposition is called Sense of Duty[86]." This view of the Sense of Duty would I think be somewhat rare even among admirers of Bentham, at the present day. Questions, however, of Duty and Morality (in the ordinary sense) apart, Mr Thayer's is a fair enough description of a great deal of the popular *usage*, upon which modern non-statutory Law is largely based, whether through judicial decision, professional practice, or generalisations of text-book writers. Such usage is continually being turned into Law on morally indifferent matter of mere convenience or reasonableness. Construed in this latter sense, Equity, as may be seen from Professor Lefroy's third class of cases (above, p. 128) will sometimes approximate very near to that notion of "public utility" with which Austin identifies one of the uses of the word, though I doubt whether a certain amount of *moral* signification is ever entirely absent from any such use.

As has been pointed out above (109) the general meaning of Equity is not quite so distinct and absolute as those ideas of Right and Wrong which are still plainly recognisable in modern Judicature and Judicial Legislation, and without which it is scarcely conceivable how primitive Law can have originated, except in the usually fabulous cases of direct legislation by despotic power. Equity may, however, in our English use of the word to denote a quality of Administrative Justice, have approximated nearer to those ideas than did the Roman *aequitas*, from our particular connexion (due to clerical or theological antecedents) of the word and subject with Conscience[87].

[86] "Possession and Ownership," L. Q. R. xxiii. (1907), p. 176.

[87] See Spence, i. pp. 413—415. On this subject, and on the charge of *arbitrariness* based on this connexion see below, pp. 143, 144.

It may also be that it is not merely a consideration for the importance of Contract, but a general preference, which has led some English Judges, where they have no previous rule or precedent to rely on, rather to appeal to the Moral sentiments of Justice and Humanity than to Austin and Bentham's favourite "general utility" under its name of Public Policy (see above, p. 129). Something of the same higher regard for moral principles as a foundation of Law may be observable in the occasional claims of a superior antiquity and permanence for "Natural Law" made by the Classical jurists and Justinian[88].

The part of the Judiciary in Legislation. In view of Jhering's condemnation of Customary Law quoted above (p. 134), I must here so far anticipate the subject of Modes and Forms as to say a few words on the general merits of the part played by Judiciary agency in the developement of Law out of Custom and Popular Morality. For Jhering, though he does not, I think, as some others, ignore the peculiar character and force of the latter, does certainly fail to do adequate justice to an important intermediate stage between the fluid *Sitte*, on which he heaps his depreciatory epithets, and the crystallised *Gesetz* to which alone he appears to allow the name of Law. The present remarks apply not merely to old Roman and early English Common Law (to be described in § 7) but have, as Jhering's own views are usually intended to have, a modern application. I am, of course, referring to the important body of Case Law, which will clearly soon be recognised on the Continent, as it has long been in England and America, and which may well be set in comparison with the questionable ideal of final Codification.

Statutory additions, amendments and consolidations may

[88] Just. 1. 2. 11; Gaius, Dig. 41. 1. 1. pr. See too ll.cc. in P. J. p. 362, n. 45.

really do much—Codification, on rare occasions of Napoleonic autocracy, and with Parliaments more manageable than what we call their "mother," may apparently do more—to attain the symmetry and definiteness which Jhering regards as essential to the existence of Law. We English, however, with a considerable amount of experience, while we certainly do not, in Jhering's words, look back upon a pre-Statutory period as a lost Paradise, can scarcely find, either in our own Statute book or any other nation's, the full fruition of a promised land. The want of elasticity which even its advocates admit to be some drawback in the pure Statutory system, as against the merits of fixity, definiteness and consistency, can "at any time," Jhering holds, be remedied by alterations corresponding to the developement of commerce and the "National Intuition of Right[89]." The scope of reform which he indicates is somewhat limited, and the words relating to the process would seem rather to suggest official regulations, or notices like those of the Roman Praetor (see below, § 6), than the lengthy and cumbrous procedure of modern Parliamentary Legislation. Both of these modes of lawmaking are, in fact, Statutory, and to be distinguished, in both cases, from Judiciary Legislation, in the form of English Case Law.

The struggle, however, for objective Right (see above, p. 134), is in Jhering's point of view now only required in the case of *fundamental reforms* for which direct national Legislation is necessary; partly in order to express the change, which has presumably been matter of great question

[89] See generally Geist, ii. § 25, particularly pp. 33, 37. The above-named merits or requirements connected with Statute Law—*Festigkeit*, *Bestimmtheit*, *Gleichsamkeit*—are summed up ("*Kurz*") as *Selbständigkeit*, a term to which I am unable either to find or give what seems to be its full content in translation. The subject of §§ 24—28, *Selbständigkeitstrieb*, appears to combine the "tendency" to Independence, Substantiality and Self-sufficiency, and *from* the automatic and uncontentious growth of Savigny's Customary Law, which is decried in the first chapter of the *Kampf*, the object of the struggle being to replace this by something really *positive*.

and debate, in clear and authoritative terms; partly, no doubt, as it is put by Jhering, to overcome vested interests[90]. Now Statutory Law, as confined to supreme Parliamentary Legislation, is obviously the proper instrument for cutting Gordian knots and stating broad principles in few words: but, for the ordinary and necessary developement of Law from day to day, all experience points to the desirability of finding some other way.

It has been just now suggested that official or subordinate Legislation, by way of regulations and formulae, would appear to be the supplement desiderated by advocates like Jhering of the reduction of Law generally to Statute. On the spread of this method in modern systems, its faults and its necessary limitations, I shall have to say a few words hereafter (§ 4, p. 192). It is scarcely probable that any such amount of change in Substantive Law, by official Legislation, would now be tolerated, as was actually effected at Rome in the Praetor's Edict. Yet even that form of developement was crystallised or terminated by one of the ablest of sovereigns—Hadrian: partly perhaps for purely Imperial reasons, but more, I would suggest, from its being found inadequate, compared with a growing body of Law which should be based directly and continuously upon the exigencies of real life, as seen and provided for by trained lawyers in everyday practice.

There are no doubt differences, both in form and authority between the *Responsa Prudentium* and our present Case Law: there is also to be taken into account the varying degrees of authority allowed to judicial precedents, not only as between different modern nations, but as between different ages of the same nation. Both these points will be fully considered hereafter (§§ 7, 8). But that judicial decisions generally, from the time that they are in any way continuously

[90] See p. 5 in Lalor's translation of the *Kampf*.

noted, must automatically result in the introduction of new or the developement of old Law is, I submit, a self-evident truth, whether the result may appear in professional generalisations, as with the modern text-book writer and the Roman Prudens, or take the form of direct subordinate Legislation, as practically with the Roman Praetor[91], or remain in that of indirect Legislation, as in any English judgement which constitutes a new precedent. My main contention is that, at the bottom, now, as from the beginning, the Judge is the chief and the best agent in the making of Law. His function is, not only to administer what has already been enacted or recognised, but to apply daily, to the new occasions which must arise, what is, for the time being, generally held as Right and Reasonable by the better informed and better disposed part of the Community; and so to make new Law. This function will remain as important after all the Codes that may have affected finality, as it was after the Twelve Tables, or the Edict of Hadrian, or the Code Napoléon.

The judge's so-called arbitrium. One of the great merits attributed by Jhering to Statute Law is the elimination of the "subjective" or personal element, the uncertainty of which mars, in his view, even the important contributions of an early Judiciary to the fixation of nascent Law (see above, p. 133). I shall endeavour to shew hereafter how an actual fixation, by formularies or generalisations, would appear to have been carried on and handed down in some at least of such Judiciaries by their *corporate* character. At present I wish merely to discuss this so-called *arbitrium* of the single Judge, which has been represented (see above, p. 112,

[91] On the inclusion of the Edict under *jus scriptum* see below, § 6, p. 340. I do not, it must be noted, include, under this general idea of Judge, the *judex* of the formulary period. The judicial Legislation of that period was effected by the Prudentes, the Praetor or the Centumviri.

n. 39) as one of the meanings that "Equity," when predicated of judicial decisions, practically bears.

In the passage to which I more particularly refer, Austin, while fairly admitting the *value* of the Judiciary Legislation, which results from the English system of Case Law, is not, I think, equally fair, or correct, when he speaks of innovating judgements baldly as delivered *ex proprio arbitrio*, according to the Judge's *own* notions of what *ought to be the Law*: though in another passage he agrees that a control *is* exercised over the Judge's *arbitrium* by *public opinion* as well as by the influence of private lawyers[92]. This statement, as to the *arbitrary* grounds of judicial innovation, derives, I think, some support from an inexact apprehension of the *arbitrium* of a *judex* in Roman Law, but more from the middle age conceptions of English Equity and from the special circumstances which led to the establishment of a separate system in that case (see above, pp. 113, 114, and 126, n. 73).

Although the remedial jurisdiction of the Chancellor or the King's Court does appeal from the first to common moral principles of fairness or substantial justice, honourableness and conscientiousness[93], yet the foundation of it all is the King's Prerogative of Grace; and the *Conscientia*, which was originally and properly understood to be that of the party concerned was sometimes incorrectly represented as that of the King or Chancellor[94]. Hence Selden's half jocose

[92] Austin[5], 37. 634, 635; 38. 645, 646; St. 324, 325.

[93] Spence, pp. 335, 339, 411. P. J. pp. 374, 375. The above seems the best available rendering of the untranslateable *honestas* (see P. J. p. 118, n. 10), the meaning of which is to some extent indicated in Austin's, or Muhlenbruck's, "Equity as synonymous with the performance of imperfect obligations," Austin[5], 33. 582, 583. It should be remarked that the passage of Pomponius there quoted (Dig. 1. 1. 2) refers not to Equity but to *jus gentium*, which includes, as distinguished from Ulpian's *jus naturale*, religion, duty to parents and to country (see above, § 2, p. 50).

[94] We may compare the *religio* Praetoris of Aquila, Dig. 26. 10. 2, and that of the *judex*, s.v. in Dirksen's Lexicon. For the further developement of this

imputation of arbitrary pleasure or simply personal opinion to the decisions in Chancery[95]. Any such arbitrariness, which may have to some extent existed in earlier times, was distinctly disclaimed by Lord Nottingham[96] often styled the Father of Equity. Even before his time, precedents in Chancery, though not definitely recognised as of binding authority, must have occurred, and it is a commonplace of our text-books that principles of English Equity have long been as definitely settled as those of Law, though finality can no more be claimed for the one than for the other in a system possessing the vitality and the growth of judicial legislation[97].

To return, however, from the special case of the English Court of Chancery to the subject of the Judge's *arbitrium* generally—that word being used rather in the sense of modern Jurisprudence than of Roman Law—it must be admitted that the part played, in the generation of Law, by early Judicature, is much more definitely recognised by Jhering (above, p. 137), in spite of his qualifications, than anything to the same effect by Savigny and the later Savinians who almost overlook the channel as compared with the alleged "Source." This is at least imputed, and

idea by the Canonists see above, p. 177, n. 55. This particular English interpretation of "Conscience" begins according to Spence in Tudor times (i. 413, 415). By a memorandum on the Close Roll of 7 Ed. 4 the Chancellor was to determine according to equity and conscience, which Sir T. D. Hardy explains to be his own conscience (General Introd. xxxi). A passage quoted by Spence (ib. p. 339, n. *b*) from the Year Book of the 9th of the same reign, p. 14, throws no light on this question, as it merely alleges the Court's "absolute" power to discover the truth by other means than those of the Common Law.

[95] Op. 3. 2028. See Blackstone, iii. 27. 432.

[96] In the original case, Y. B. 4 Hen. 7, p. 5, referred to by Lord Nottingham, Cook *v.* Fountain (1676), 3 Swanston, 600, 601, it is not very clear from the language of the Chancellor, which is more vigorous than intelligible, whether the Conscience is *his*, or that of the party complained of, or both. Lord Nottingham mainly insists on the Conscience of the *Court* as being *Civilis et politica* rather than *religious* or *personal*—referable, that is, to some ordinary standard, not to the "mere fancy and imagination of a Chancellor."

[97] See generally the remarks and quotations in P. J. pp. 376, 377.

I think with some justice, as a notable omission in the theory of the Historical School of Jurists, by Professor Lambert in his valuable "Fonction du droit civil comparé[98]."

At the same time, M. Lambert's own somewhat extreme view as to what he calls the[99] *creative* function of judicial practice—nearly akin to Austin's *arbitrium*—besides requiring, as we shall see, considerable qualification when we come to the actual facts of modern judiciary Law, is often totally irreconcileable either with the phraseology or the traditions of early judicature and legislation. In the infancy of legal systems, the *rôle* of Prophet or Seer is frequently combined, and in the position of predominant partner, with that of Judge, appeal being moreover occasionally made, in political business, to the will, pleasure, or direct command of Heaven (see § 5, p. 297). It is not my business to compare the various degrees of claim to superhuman inspiration or authority, amongst which the orthodox Christian belief recognises one alone as genuine; or to estimate the various motives, ranging from the highest to the lowest, which a Gibbon would lump under the generic term "pious fraud." But I think that the circumstances in general of such illuminated judgements justify me in the conclusion arrived at above (p. 102), that they must always have been in some measure in accordance with popular feeling, which no doubt they have often improved and educated, but without which they would have had no power either to operate as individual decisions or to crystallise into general rules[100].

In more historical times, apart from the special English case of reference to the King's or Chancellor's conscience (above, p. 141), another sort of arbitrariness—at least in the

[98] Études de droit commun législatif, T. i. particularly pp. 127—141.

[99] ib. p. 255.

[100] See, on the general relation between the legislator and the national will, Brown, p. 350; also below, § 4, p. 165.

negative sense of independence of general or popular ideas of Right and Wrong—may have been attributable to the Judge as the appointee or instrument of the Sovereign. There have been cases, even periods, when the individual interest of a personal Sovereign has been evidently regarded, and sometimes avowed, as a main object to be considered in the administration of justice. But this is, after all, rather a crude and imperfect recognition of the principle of *general utility* than a personal fancy of the judge[101].

A still more recent danger is the possibility, in democratic constitutions, of precedent set by decisions in accordance with political partisanship, wherever that element has most improperly entered into the appointment of a judge, and continued to exercise upon him its baleful influence. Comparatively permanent tenure of office by the appointee, individual responsibility, as distinguished from popular election, in the appointer, are the means by which this danger is to be met. On the whole, that purity of the Bench which is sometimes rather ostentatiously proclaimed as the peculiar boast of England, may surely be stated as the rule rather than the exception in all civilised nations of the present time—a time when the regular publication of judicial decisions must result not only in some approximation to judicial legislation, but also in some judicial regard for contemporary lay feeling and opinion.

We do not at the present day hear much of "Natural" Law or Right, and are somewhat cautious of appeal to "Rules of Morality obtaining or thought to obtain in all nations and ages[102]." The very modified form in which a

[101] It may be questioned e.g. whether a desire to serve the interest of the Sovereign or an honest recognition of national utility was the motive for the change towards Primogenital Inheritance in early English Land Law. See Kenny on the Law of Primogeniture, pp. 20—28; also below, § 7, pp. 344, 348 and § 8, p. 387.

[102] Austin, Outline, p. 37. See also above, § 1, p. 8, n. 16.

comparatively universal Moral sense is here claimed (above, p. 97) admits of great variance, for different times, even in the idea of Justice, certainly in those of Reasonableness and Public convenience, and therefore in that of the important middle term Equity[103]. The points upon which I wish at present once more to insist are that judicial decision must be from time to time required into which the expression of some of these ideas will enter, beside and beyond the bare administration of existing Law, and that any such expression is really an appeal to general feelings of approval or disapproval current at the time, of which the Judge should be, and generally is, the enlightened and judicious exponent. And the innovations which, in the end, unavoidably result from such decisions, if too much credited by M. Laurent to the pure initiative of the judiciary, are on the whole rightly described by him (p. 168) as advances due to progressive social movement or feeling.

Special case of International Law. A very recent protest lies before me, by Professor Holland (L. Q. R. xxiv. p. 79) against article 7 in the Convention of 1907 for the establishment of an International Court of Appeal in Prize Cases. This article provides that, where International Law is silent, the Court is to decide in accordance with the general principles of Justice and Equity. It is not satisfactory to have to admit a protest against so fair-seeming and noble an aspiration. But on this point I am glad to express my perfect agreement with Professor Holland. The application of these "general principles," in the last resort, by a *national* Judge, representing his country's idea of Right and Justice, is not on the same footing with conflicting invocations, even of these high principles, by a Jury of Commissioners, who must still be, to some extent, on the unsettled points, national partisans. With every belief in the benefits

[103] See Professor Lefroy in L. Q. R. xxii. p. 429, &c.; also above, p. 129.

to be anticipated from a standing International Court, one may be permitted to hold that anything beyond the application of definitely accepted rules, or the assessment of definitely specified claims, must be settled by a give-and-take arrangement *ad hoc* of the parties concerned (see below, § 9, p. 428).

§ 4. LAW AND THE STATE

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It is unnecessary to repeat what has been said above (§ 2, p. 68) as to the possibility, and on the whole desirability, of first considering Law generally, or *per se*, before we come specially to treat of Law as connected with the State. In dealing with the latter relation, some part of Austin's voluminous 6th Lecture may perhaps, as was pointed out in my first section (p. 25), be omitted: but the greater number of the various topics there introduced are so important, and the particular subject of Constitutional Law requires so much more attention than Austin gives it, that this section must, I fear, be also somewhat voluminous. An additional part, containing a theory on the historical origin of certain ancient states, which had been prepared as an appendix to the present section, has been left for treatment in a future volume (see above, § 1, p. 22).

The essentials of a State. In considering the relation of Law to the State we must first try to make clear what is fundamental in the conception of a State or Political Society, which has hitherto been assumed as something known and not requiring definition. Here, of course, as elsewhere, it is best to start with modern ideas, expressed in the ordinary meaning of words. And the conception in question is evidently a matter of *growth*, gradually including

something which would not, possibly excluding something which would, at one time or other have been coupled with the name, or its earlier equivalents. The endeavour, however, may be made, to determine so much as appears to be sufficient, and no more than appears to be essential, for the conception of a State in general, ancient or modern. And, as elsewhere in this Subject of Jurisprudence, I still think that we cannot do better than take Austin's definitions by way of text, or of programme.

A considerable amount of modern literature, and perhaps more of ancient, about the State, is, as to our immediate purpose beside the question. We are dealing with the State simply as a *positive*, i.e. an existent working institution (see § 2, p. 69), and that only in one special relation, i.e. to Law. On the one hand, therefore, we may pass very briefly over what Austin has to say about the proper *ultimate ends* or objects of a State, or Bluntschli of its *ideal* (see below, pp. 166, 169), and confine ourselves to the *immediate* ends, which will be spoken of presently as *essential functions*. On the other hand, the views of Austin upon what is generally styled Constitutional Law require to be decidedly reconsidered in the light of recent experience and political theory. It will therefore be necessary to enter into some detail with regard to the various forms of Sovereignty as a whole, and still more into its alleged subdivisions. But this subject will be confined, as far as possible, to its bearings upon Legislature and Judicature.

Terminology. I may remark here that, for the investigation of what may be essential to the conception of a State, there is a real advantage in using that particular word, under its various linguistic forms, in preference to other names.

State, état, stato, staat, and the like, are terms conventionally used, of little intrinsic meaning (beyond the expression of a *positive* or actual condition of affairs), and involving no

theory or begging of questions as to origin or otherwise[1]. Such words, on the other hand, as Nation and People, while their original meanings may be of great importance for historical enquiry, are, in their modern use, ambiguous or polemical. For our present working purpose the colourless name is the best.

Austin's definition of a State. The following are the points insisted upon by Austin as necessary and adequate for the definition of a State or Political Society.

1. A State consists of a body of human beings, out of which a determinate part, whether consisting of one or many persons, is habitually obeyed by the remainder, and is not habitually obedient to any other human being: these two portions of the State being termed respectively Sovereign and Subject.

The above is rather an abstract of nine or ten pages at the beginning of Austin's 6th Lecture than a definition given by him in so many words. The matter referred to is based for the most part upon a definition of Bentham's which will be found in his Fragment on Government[2].

2. In order to exclude from his definition such a Society as a single Family, Bentham added, as an essential of *political* Society, that it should be "capable of indefinite duration" and accordingly require "a greater number of members." With the same object, and a similar laxity of expression, Austin postulates a "considerable" number, quoting *à propos* the dictum of Montesquieu, that a political power necessarily comprehends the union of *several* families, and urging the

[1] See Bluntschli, Book i. ch. 1, p. 23, note, and generally Book ii. ch. 2. Austin has some good remarks towards the end of his long note *p* on 6. 243, 244. I must take exception however to his statement that "*the* State is usually synonymous with *the* Sovereign"; and still more to his use of the word Sovereign as an adjective applied to the whole State in a sense better expressed by the word *independent*, see below. If "an independent political Society *is* often styled a Sovereign *and* independent state" the words are mere tautology.

[2] Fragment 1, § 13, n. *c*; i. p. 264 of Bowring's edition of Bentham's works.

absurdity of a supposed State consisting of one[3]. This occasional application, by Austin, of the indefinite, but obviously inevitable, test of *practical importance or unimportance*, has been referred to before (§ 2, p. 54). The measure of amount or number in a State seems to me incapable of exact determination: I shall however return to the subject hereafter (p. 167) and try to give another reason why one Family could not be regarded in the view of Jurisprudence as a State.

I have not thought it necessary to consider, with the one important exception treated below (p. 152), the various additions to, and amendments on, Bentham's definition made by Austin. It will suffice for my present purpose to follow and discuss the main lines of the definition, without entering into comparatively unimportant questions of detail suggested in pp. 221—226 of the 6th Lecture, much of which is in fact omitted in the Student's edition, pp. 83, 84—as to the *date*, for instance, when the obedience in question becomes habitual, or a former obedience, yielded elsewhere, ceases; the *proportion* of the subject part of the State by which the obedience is rendered, &c. The former enquiry is important in modern International Law, as determining the question whether external recognition should or should not be extended to revolting subjects in the character of a new or inchoate State. But it belongs to exceptional periods of transition or revolution, while ordinary Jurisprudence rather regards States in their normal condition and regular growth. As to the *proportion* of persons by whom obedience is rendered, Austin's "bulk or generality" of members seems to me for the present a sufficient statement (see however below, p. 277): it should further be noted that the obedience predicated is in another sense *general*, i.e. not confined to particular matters; and *permanent*, not yielded merely for certain occasions.

Independence and Sovereignty. Reference has been

[3] Austin[5], 6. 231, on which see Maine's criticism E. H. 13, pp. 378, 379.

made above (§ 1, p. 25) to a somewhat gratuitous difficulty which arises from the coupling together, by Austin and others, under the same word Sovereignty, of two different ideas. The internal relation between Sovereign and Subjects is certainly not the same thing as the exterior independence of the Sovereign, and the two should, for mere intelligibility, be distinguished by different names. As however the confusion, which is *primâ facie* a matter of terminology, may appear, to some, justified by an essential connexion in fact, I must here state the view of Austin on which the above terminology may be defended.

Austin holds, then, that *external* sovereignty, as it has been called, which is, at least in terms, omitted by Bentham, is nevertheless required for the adequate definition of *any* state. Unless a general or habitual independence be enjoyed by a Political Association, or strictly speaking by its head, that Association is, according to Austin, only part of another[4].

It must here be remembered, in justice to Austin, that he is merely speaking of an external independence, existing in *fact* and *practice*, however the resultant condition may be produced. A small State may, in this view, be as independent as a large one. There is not postulated any of that equality of physical power, as compared with neighbours, and possible enemies, which Hobbes seems to require in the well-known 17th chapter of the Leviathan, whereon so much of the Austinian Jurisprudence is based[5].

Confining ourselves, therefore, to *nominal* or *ordinary*, as distinguished from what, using Austin's own term, we might call *intrinsic* Independence, let us consider whether it is not too broadly put by him that a State which lacks general exterior Independence can only, *for purposes of Jurisprudence* be regarded as part of another.

[4] Austin[5], 6. 234, 236.

[5] ib. 235. See Leviathan, ch. 17, pp. 85, 86 of the edition of 1651.

If the relation between Sovereign and Subjects is really shared with, or limited by, some external authority, this is only a partial or imperfect Sovereignty, and the body exercising it might not improperly be called *half-sovereign* or perhaps more correctly *joint-sovereign*. The use of this expression is however to be strongly deprecated because it has been hitherto applied improperly to an entire Political Association to indicate an anomalous state of things very unlikely to recur again[6].

As a matter of fact, a certain degree of dependence, affecting the entirety of a Political Association in *external* affairs, has been repeatedly found perfectly compatible with complete independence as regards legislative, judiciary and generally administrative power in the Association so affected. Where these powers are exercisable wholly and exclusively by some determinate body within the Association the latter

[6] Semi-sovereignty, *Misouveraineté*, *Halbsouveränität*, are terms coming, as far as I can trace them, from a German originator (Moser); but whether devised for application to the old governments under the Holy Roman Empire, or to the States of the Germanic Confederation created by the Federal Pact of 1815 and modified by the Acts of 1832 and 1834, I do not know. Austin applies the term to the former, and regards it as indicating freedom in foreign relations coupled with subordination in the internal matters of legislation and judicature (Austin, 6. 258—262. See too P. J. p. 174, n. 58). Such a state of things is treated by Dr Westlake as "scarcely possible," which must be taken rather as meaning difficult and anomalous, because it *was* to some extent matter of actual fact in a comparatively recent case from our own history—the Protectorate of Great Britain over the Ionian islands, which only came to an end in 1863. These islands were styled an "Independent State," and were recognised as neutral in the (Crimean) war, in which Great Britain was engaged: while, on the other hand, the whole of the executive was under Great Britain's control. This was, no doubt, a most questionable form of independence, and so anomalous a case is very unlikely to be repeated (see Westlake, Int. Law, Peace, pp. 23—24). The case has been often quoted as an instance of Semi-Sovereignty and I think it is only to Protectorates that the term is still occasionally applied by modern publicists, e.g. Halleck, Int. Law[3], p. 73; Bonfils, Droit Int. Public[5], p. 112. I do not propose to consider these extremely variable and exceptional relations, or to say any more on the objectionable term Semi-sovereign.

is, I submit, in the conception of Jurisprudence a State, and has within itself the Sovereignty belonging to that conception, whether it is or is not a "real unit" or a "person" in International Law. How even a partial exercise of such internal powers, within a Political Association not externally independent, may rightly come under the consideration of Jurisprudence, I shall next endeavour to shew. At present I propose to qualify Austin's definition of a State (above, p. 150) for the purposes of Jurisprudence, by inserting, after "and is not," the words "in its relation to that remainder" habitually obedient, &c.

Confederations, Unions, Federal States, Colonies. I shall leave (see above, § 1, p. 25) to the province of International Law questions as to the possession or non-possession of International individuality which turn simply upon the *external* relations of a State. As distinguished from pure independence, it will be decided by the degrees of control or limitation in these respects, to which a political association is subject, whether it is to be regarded as tributary, confederate or merely allied. All three will stand upon the same footing under our present point of view, which considers rather the amount in which the *internal* powers of legislation and administration are enjoyed by the political association, or part of an association, in question. For it is only when these powers are exercised, as has been said above, wholly and exclusively by the government of the particular body that it comes directly under the consideration of Jurisprudence as an individual State.

These conditions are, as I take it, satisfied in the case of Tributary, Confederate, or Ally, and also, though not quite so obviously, by the members of a Personal Union, and a Real as distinguished from an Incorporate Union[7]; each of such

[7] I would here refer generally to Westlake's chapter on the Classification of States (Int. Law, Peace, pp. 31—37) but may set down briefly here what

members, however amalgamated for foreign affairs, being understood to retain a complete internal Sovereignty over its own subjects. In a Federal State, on the contrary besides the fact that foreign relations are almost exclusively under the competence of the united body alone, each "Provincial" government is, in most cases, somewhat limited as to legislative power, and is generally in a relation, towards the "National" government, of subordination or perhaps more strictly, as put by Professor Brown, of Co-ordination, rather than of full internal independence.

Such a body, then, would not, either in Austin's view or in that adopted here, come, if taken strictly, within the Conception of Jurisprudence as a State. Neither, obviously, would so-called "dependencies," like the British Colonies, at least under the conditions existing in Austin's time. We

appear to be the main distinctive features in the above named political associations—ranging from the case of a virtual continuance of separate existence to that of its entire cessation.

A Personal Union exists where States, otherwise entirely distinct, come to be connected by a common individual ruler. Such a connexion will amount to a Real Union if the ruler in question be absolute, that is if he be truly Sovereign. Otherwise, it is a mere accidental circumstance in principle, and in practice is only important as leading to awkward complications and conflicts in allegiance of the subjects. The instance usually given is that of England and Hanover while the King of England was still Sovereign of the latter country. Dr Westlake gave, in 1904, as a modern instance, that of Belgium and the Congo State: but, as is recognised in his second edition, this is no longer so: since the Congo was annexed to Belgium, in 1908, the two are either in Real or Incorporate Union. The last named relations are thus distinguished by Westlake. Under the former, the States in question are amalgamated for foreign affairs and form a single State for International Law, while internally each remains a distinct entity for legislation and administration. In an Incorporate Union the former Political Associations cease to have any corporate internal existence and together form what is otherwise called a Unitary State. Of the progress from a Personal through a Real to an Incorporate Union Dr Westlake gives as an instance the relations of England and Scotland between the accession of James VI to the throne of England and the reign of Anne after the Act of Union (1707). On the difficulty of drawing an *exact* line between a Federation and a Unitary State, see Professor Harrison Moore's Article referred to below in n. 135.

shall find, however, that both in the component parts of a Federal State (*Bundesstaat*), as distinguished from those of a Confederation (*Staatenbund*), and in the modern British Colonies which may be called virtually self-governing, there are points and problems of direct interest for Jurisprudence, because they bear upon the relation on apparently equal or superior terms of a Judicative to a Legislative, on the practical efficacy of written Constitutions, and on the Sanctions of Constitutional Law in the wider sense of that term[8].

British Dominions. On Federations proper and their external bonds what little needs to be said more particularly will be said hereafter (pp. 243, 244) under the head of self-imposed limitations on Sovereignty. Dealing for the present with Unitarian or Semiunitarian States, I come first to the more important, or practically self-governing, English Colonies —to retain for the moment the old name. As to these there are two perfectly distinct questions, one of which may be briefly treated of here.

I refer principally to the recent grouping of English Colonies into a Commonwealth or Union: the two questions being the relation of the Colony or group to the Imperial Government, and the condition of the Colony or group in its own internal affairs. Besides the cases of Australia and South Africa, that of Canada must also be taken into account. The particular circumstances under which the Constitution of that Dominion was framed, and the view taken, at that time, of our Colonial dependencies in general, differ materially, it is true, from those under which the Australian Commonwealth and the South African union were formed (see below, p. 242). But it may nevertheless be possible to discern, in all three cases, certain common features or tendencies. I omit to take into account the smaller component parts of

[8] See generally Dicey[7], ch. 3, "Parliamentary Sovereignty *v.* Federalism"; Salmond[2], § 43, pp. 114, 115; also below, pp. 246, 247.

these unions—what we may call the sub-Colonies—partly from considerations of space, and partly because much may pass muster in such a minor division, which is not adopted or retained in the larger association (see Temperley, Senates and Upper Chambers, p. 298).

Under the scheme for the re-organization of the Colonial Office in 1907, the three Colonial Polities above named are classed, together with New Zealand and Newfoundland, as "Dominions" under a separate Department; being also stated to possess "Responsible Government." (It is more convenient, in matter of style, to continue here using the term Colony, as possessing a corresponding adjective, which Dominion does not.)

The question for our present consideration here is the amount of control still exercised over these important Colonies, by the Imperial Government, in their internal affairs—notably in two points, the limitation of the Colonial Judicative by an Imperial Court of Appeal and the limitation of the Colonial Legislative by an Imperial Veto or Imperial Statutory Legislation. We must not, of course, pass without remark the conspicuous figure of the Governor General in a Colony, who represents and is appointed by the Crown, and in whom the executive power of the Colony is legally vested. But the exercise of the Imperial Executive is, as to the Dominions, limited to the above appointment, not extending to any other control over the public officers of the Colony. This particular freedom from control would appear to be all that should properly be designated by the Dominions having "Responsible Government." That the internal authority, to which their public officers *are* responsible, is at present similar to the English Cabinet, may be a fact, but is not, it is submitted, essential to the amount of self-government which these Dominions possess. As a matter of fact, the Executive in them is generally at

present subject to the same sort of advisory control as the Royal Executive at home, and by the same sort of Ministerial body, which again is dependent on a Parliamentary Majority in the "Lower" House[9].

With regard to limitation of Colonial Judicative by Imperial Appeal, a right of Appeal to the king in Council from any Colonial Court in the British dominions (the word not being used here in its technical sense) exists both by Royal Prerogative and under the Judicial Committee Act of 1844 (7 and 8 Vic. c. 69, § 1). This Appellate Jurisdiction is recognised, but abolished or limited for Appeals *as of right* from the highest Colonial Courts; in Canada by the Canadian Statutes regulating the Supreme Court (Revised Statutes of Canada 1886, c. 135, § 71: 1906, c. 139, § 59); in the Commonwealth of Australia by 63 and 64 Vic. c. 12, § 74; and in the South African Union by 9 Edw. 7, c. 9, § 106. Moreover, as a result of the Colonial Conference in 1907, rules have been drawn up by the Imperial Appeal Court, the Judicial Committee of the Privy Council, the effect of which is rather to discourage applications for a grant of special leave to appeal, such application being still open to a litigant in cases where his Appeal as of right had been barred by colonial legislation.

On the whole, the present tendency would appear to be in the direction of reducing this Imperial interference with the Judicative of these self-governing Colonies within very small limits; if not of making it matter of "good offices"

[9] See generally Keith's Responsible Government in the Dominions, ii. ch. 3, "The Government and Ministers." As to the meaning of Dominion, ib. iii. pp. 1313 and 1512, n. 1: also Statesman's Year Book (1912), p. 99. On Responsible or Cabinet Government generally see below, p. 177. In the Colonies it is matter of Custom and Convention, not, at least directly, of statutory recognition. See Anson, Crown, ii. 69, 70; Keith, p. 959 and Harrison Moore, Constitution of Australia, p. 212. "Representative" Legislation is statutorily defined in the Colonial Laws Validity Act as existing where one half of the Legislative is elected by "the inhabitants of the Colony."

dependent on voluntary application by that Judicature[10]. I shall therefore leave that matter out of the present question.

Upon the other point—the limitation of Legislature within our more important, or self-governing, Colonies—there is, besides the Constituent Act of Parliament, an overriding power in Imperial Acts of Parliament generally, under the Colonial Laws Validity Act of 1865 (28 and 29 Vic. c. 63, § 2). But this is very rarely used for legislation which might affect the internal affairs of a Colony possessing a Legislative of its own: and, in such cases, all that the Crown in Council retains is a power of Veto. This Veto is not, it is true, practically obsolete, as that of the Crown is generally held to be with regard to our own Parliaments: it is actually and, according to Dicey, frequently exercised; mainly, perhaps, where the Act in question might indirectly affect International relations. The *frequency* is, I think, put too strongly with regard to the Commonwealth of Australia, but undoubtedly this legal recognition of Supremacy in the Imperial Government is a reality. In the recent South African Act a considerable number of important provisions are specified, for the repeal or amendment of which any Bill must expressly be reserved for the King's, i.e. the Imperial Government's, assent or otherwise[11]. Such limitations as the above might in strictness suffice to exclude even bodies like the Australian Commonwealth and the

[10] On these appeals see Anson, ib. pp. 289, 290: Moore, Constitution of the Commonwealth of Australia, pp. 247, 248; Keith, op. cit. Pt. v. ch. 3; also an interesting Article from "The Times" quoted in Journal Soc. Comp. Leg. x. 178—182.

[11] See Dicey[7], pp. 110—116; Anson[3], Vol. ii. Pt. ii. pp. 73—75; and Moore (Constitution, &c.), pp. 95—97. In the South African Act (9 Edw. 7, c. 9), see § 64 referring, *inter alia*, to §§ 32—50. The tendency however is obviously for the Imperial Government to interfere less and less with the action of the Colonies in law-making. See, as to the Immigrants Restriction Act, in particular, of the Transvaal legislature (1907 No. 15) Dicey[7], p. 115, n. 2.

South African Union from our category of States, as being merely integral parts of the British Empire. They would be excluded *sans phrase* by Austin, whose latest apologist logically confines the Austinian definition of Sovereignty to "the purposes of a Jurisprudence exclusively concerned with fully developed States." But Professor Brown's more practical application of Austin does not omit to supplement his text with several suggestive notes and additions. Salmond, on the other hand, who has successfully criticised most of the more rigid Austinian dogmas, has, on this question, What is (for Jurisprudence) a State? gone so far as expressly to include these "dependencies" within that category. For he considers some, at least, of our own Colonies to be "true though not independent States," instancing in particular the Commonwealth of Australia as possessing a separate Legislature, Judicature and Executive and being thus separately organised for the maintenance of peace and justice[12].

The co-organisation of these political bodies with the Mother Country, for the purpose of external defence, also, as we shall see (p. 164), enters into Professor Salmond's consideration. Its importance, as probably (together with a real, though so-called sentimental, devotion to the Crown) the main connecting link in the future, is of course not to be ignored, but it does not enter into the province of Jurisprudence as here treated. I shall also leave out, as a mere matter of academic discussion, the question whether, under the limited amount of interference or control, in *internal* affairs, by the Imperial authority, above described, the Sovereignty should be said to reside in the Imperial Government or in the Imperial and Colonial Governments jointly.

[12] Salmond[2], p. 112. See also Brown (on Austin[5], 6. 255), pp. 139—143, comparing Excursus A, particularly p. 268: and, on the different points of view necessarily taken by the student of International Law and of Jurisprudence, pp. 275, 276.

The relation, on the other hand, of the original Colonies associated into the Dominions, to one another or to their central Government, which is very closely parallel to the case of the individual States in a Federal Union, is both interesting and important, but comes, as has been intimated, more conveniently for consideration below, under the head of "written" Constitutions and self-imposed limitations of Sovereignty. I pass now to certain additions, which must be made to Austin's definition of a State.

Territoriality. Apart from the questions, rather forming matter of International Law, broached in Austin's 6th Lecture, which have been in the main passed over here, as exceeding the province of elementary Jurisprudence, there are one or two points in which, on the other hand, his definition appears to come short of the conditions required, at least in modern times, for any Association which would be called a State. Among these will generally be reckoned *local juxtaposition*. It would seem at first sight obvious that, while a State may consist of bodies of men distant from one another but each comprising a number of individuals or families living together, it cannot consist simply of scattered individuals or families. A great authority has undoubtedly been exercised over widely dispersed human beings by the heads, for instance, of the Mahometan and Medieval Christian religions; but the corresponding obedience has not been of the permanent and general character required in the definition of a State (above, p. 151). In this point of view the disputed and occasional supremacy claimed by some of the Popes in more distant parts of Christendom may be contrasted with the genuine Sovereignty exercised by the Papal government in what were correctly called the States of the Church, or with the still more limited local authority which came to an end in 1870[13].

[13] Westlake, International Law (Peace), p. 37.

As has been hinted above (§ 2, p. 89) it seems by no means impossible that Clubs, of members belonging to different nationalities and quite distinct political associations, may, if not at the present time, in no very distant future, put in claims to recognition, as an authority or at least an organised influence, of a very formidable character. But they can never altogether dispense with or replace local Government, though they may conceivably come to have some voice in International relations as well as occasionally to exercise pressure on National Legislation.

Beyond the bare fact of local juxtaposition, a *permanent* territory, whether consisting of one or more parts, is also considered by most modern writers as essential to a State. I am inclined to agree with Austin that the name cannot be justly denied to Societies *in transitu*, merely on that ground; and it might perhaps be claimed for those who remain regularly in a nomad condition. Among modern States these cases, if occurring at all, are so rare that they may practically be disregarded. In the remote times of Popular Migration[14] (*Völker-wanderung*) this case is more conceivable. The Moses or Joshua of scripture, the Romulus or Hengist and Horsa of legend, may fulfil all requisites of the Austinian Sovereign. Whether their supremacy was likely to possess the characteristic of governing by general rules, is another matter, to be considered presently (see below, p. 165, on Legality).

The principle of Territoriality in a State, when applied to the Sovereignty exercised within that State, seems sufficient to meet the difficulties raised by Austin in some of the anomalous cases, as he considers them, stated at the end of Lecture 6. The particular application of the principle, to which I refer, is to the effect that a Sovereign has power (1) over *property* within his territory, by whomsoever owned;

[14] Austin[5], 6. 335, n. γ; Salmond[2], p. 99.

(2) over *persons* within his territory whether his subjects or not[15].

Territorial and Personal Law. Before leaving this subject, of the State and its Sovereignty being *localised* in a definite territory, or aggregate of territories, we may remark that such localisation is quite compatible with the administration of different systems of Law, on the one hand in different provinces or districts, on the other hand to different classes or races scattered throughout the same territory. Of the former a familiar example may be given in the application of Hindu and Mahometan law, or of special Colonial legislation, in different parts of the British Empire; the latter is the now obsolete case of Personal Law—the case of different systems being, for instance, once applicable, in the Roman Empire and the barbarian kingdoms founded on its ruins, to the individual Roman, Goth, or Burgundian. Still, in all these cases, the particular Law must have been ultimately enforced by, or under the authority of, a common Sovereign, and these Personal Laws were in course of time merged in a common territorial one, subject to slight local variants[16].

Salmond on the State. On another and a very important addition to Austin's definition I am glad to avail myself of a recent authority with whom I am in general much more in accordance than with Austin, and to whom I wish particularly to acknowledge my deep indebtedness. Professor Salmond, on the general idea of a State, practically follows Hobbes (above, p. 152), or rather Hobbes as interpreted (later)

[15] Austin[5], 6, 330—333; St. 143, 144. The more difficult questions of double nationality or conflicting allegiances are indicated, but expressly, and properly, omitted from what Austin calls the "generals" of Jurisprudence, ib. pp. 333—335. The latter part of Lecture 6 is very much abridged in St. 145—147.

[16] See Salmond[1], ch. 25, pp. 599—602 (omitted in 2nd edn); Westlake, Private International Law[5], pp. 13—17.

by Herbert Spencer in his Principles of Ethics. Of the two *essential functions* of a State, by which it is distinguished from non-political Societies, one, nay, according to Spencer, *the* primary function of the State, or of the agency in which the powers of the State are centralised, is that of "directing the combined action of the incorporated individuals in War"; the other is the Administration of Justice[17].

An exception, which I venture to take to the above *order* of functions, is not, I submit, merely academic, but matter of principle and history. In adopting the view of Spencer, Professor Salmond is probably indicating, with truth, the *immediate genesis* of Sovereignty, in the inchoate condition of most old political associations. But we certainly find some administration of justice to have, in many cases if not in all, *preceded* the developement of permanent Sovereignty, as distinguished from the temporary headship of a military chief. Preparation for War, under some such headship, does not therefore appear to me correctly set down as the primary function of a State. Some representative authority, in order to render external dealings possible, must obviously have been essential, from the first, to an individual political entity; but among the established States, even of ancient times, Peace has been, on the whole, ostensibly admitted to be the normal state of things, War the exceptional necessity. For the present moment, indeed, the old military capacity of wielding the aggregate power of a State still presents itself only too apparently, to all but visionaries, as a precaution—but surely, not as *the* primary function. On that I have now to speak.

Legality or the administration of justice. A graver fault, in Austin's definition of a State, than the insertion of an unqualified claim to external independence (see above, pp. 153, 155) for its Sovereign, is the omission of what has

[17] Salmond[2], pp. 93, 94, and Spencer as cited on p. 94 n. 3 and p. 98 n. 1.

been broadly described by the term *legality*—i.e. the internal existence and administration of general rules of conduct. This is, as will be seen, merely a more dogmatic and Austinian statement of Professor Salmond's second *essential function*[18]. It will be my endeavour to shew that a centralised administration of Justice has been the precursor of Sovereignty in several historical cases, and that some such Administration, of a minor or local character, is almost always older still; while the practice of *conscious original legislation* by the Sovereign has generally been a comparatively late developement.

Assuming, however, the existence of Subjects under a Sovereign who should elect to abrogate all general rules, or should never have recognised any such rules, but should govern entirely by individual arbitrary commands, we should still, in Austin's view, recognise this Association as a State. Of course it would be out of the purview of Jurisprudence, which only deals with Law, and therefore only with States that have Law or Legality. As a matter of mere fact, the existence of such Associations at all, except for temporary military purposes, must be questioned. Even in the most despotic governments of history, which have not made or administered any Law of their own, there has evidently

[18] See above, p. 164. We may note, by the way, that it comes *first* in the passage which Salmond quotes from the Book of Samuel (i. 8. 20). So too Sir Roland Wilson is right, to my mind, in regarding the State *primarily* as a Justice-enforcing Association. As against a somewhat severe criticism of the work referred to ("Province of the State") in L. Q. R. xxviii. p. 198, I would urge that the "Administration and Enforcement of Justice" may be taken as having a fairly definite and intelligible meaning, dependent on the moral feeling of the time, without calling in either Spencer, Plato or Aristotle to define Justice; and that it is quite possible to regard this as the primary function of a State, without arriving at the more startling conclusions of Sir R. Wilson, e.g. Land Nationalisation. The latter does, as a matter of fact, accept Spencer's definition or formula of Justice, but arrives, in this and some other cases, at very different conclusions from those of his authority (Province of the State, p. 254).

been, under all the governmental exactions and conscriptions, a certain amount of religious or customary rules, administered in local courts, with which the Sovereign has rarely intermeddled, or, if he has, rather to enforce or support than to abrogate[19]. Direct legislation by the Sovereign is not essential to the conception of a State; but as a mere question of order against anarchy, or of convenience to the ruling body, no monarch, however absolute, ever has, or could have, dispensed with the existence of *all* general rules of conduct among his subjects—general rules too which are not truly represented as bare police regulations[20]. It is not merely that such a body would never be *called*, by any modern, a Political Society; but that its existence is scarcely conceivable, except perhaps in two cases—a host, or rather a horde, under sole military command, and an isolated Patriarchal Family. The former is, I believe, a historical but temporary and occasional state of things, traceable here and there in the survival of names pointing to a military organisation, and dating apparently from the earliest infancy of what is afterwards an ordinary Political Association[21]. But such a system has evidently lacked that permanent and

[19] The instance which will of course occur at once to students of Jurisprudence is Sir Henry Maine's (partly perhaps hypothetical) case of Runjeet Singh (E. H. pp. 381, 382). One coming more home to ourselves may be established from the researches of Maitland and Vinogradoff, in the small local Courts of England which only gradually pass under Seignorial influence and are ultimately merged in the King's Justice.

[20] Simple repression of violence or disorder—Huxley's Anarchy plus the Policeman—seems to be the function of what Bluntschli intended under the name of a *Polizeistaat*; such function being, in his view, liable to developement into "paternalism" or "grandmotherly Legislation" (Theory, pp. 65, 66). For Bluntschli's further stage of a *Rechtsstaat*, see below, p. 169. A much wider meaning of *Polizei* was attributed to German writers by Holland in a previous Edition of his Jurisprudence[9], p. 354: but it seems, as a technical term, to be now narrowed by him to what we should call ordinary Police Regulations and provisions for Public Health, Holland[10], p. 366, n. 1.

[21] E.g. the Romulian Centuries and the original Teutonic Hundred.

settled character which Bentham rightly postulated as essential to the idea of a State (see above, p. 150).

Much the same objection is, to my mind, the true answer to the question—Why may not a single Family constitute a State? Such an idea is, of course, inconceivable to the general reader of the present day, and is scouted by Austin as absurd (above, p. 151). But the isolated Patriarch has been too often employed in later Jurisprudence to be quite so summarily dismissed, though he is not so much in favour as he once was, and must be allowed open to question as a historical character.

The general conception of such a Head is as governing simply by *occasional commands*: indeed it is difficult to see how, under this particular form of despotism, customary rules could come into existence at all. And in any case the *duration* of such a *régime*, beyond the life of an individual, would seem improbable.

Now possibility of *indefinite* duration is, it will be remembered, Bentham's important corollary to the definition of a State; which Austin satisfies by requiring that his "body" should consist of a "considerable number" of individuals, comparing Montesquieu's "several families." To this we may add Aristotle's rather wider specification of the State or City (πόλις), as arising from a community of several *villages*[22]; though I can suggest no definite standard of number, except perhaps that it should be sufficient to ensure so much external independence as will render possible the *internal* authority, and obedience to authority, postulated by Austin for his supreme government. But that government, if conceivably carried on by occasional commands *alone*—which is

[22] The passage (Politics, 1. 2. 8; Bekker, 1252[b]) cited in Professor Holland's interesting collection of definitions of a State (Jurisprudence[10], pp. 44—46), as there translated, "is *already* a City" (or State), though in accordance with the following words, depends upon a reading which is not accepted by Bekker or Stahr.

all that the principal part of Austin's definition absolutely requires—would certainly not appear to have the cohesion necessary for any long duration, and cannot, so far as I know, be illustrated by any historical instance.

Whether, therefore, we regard the possession of a permanent territory as essential to a State or not, we must, I think, hold Austin's definition inadequate unless some such condition be added as that the body of human beings in question must be subject to the administration of general rules of conduct, enforced, if necessary, by the supreme authority, whether such rules are imposed or only allowed and recognised by that authority. The true primary function of all States appears to me well put, in a general way, by Professor Salmond, when he defines the Territorial State as "a Society of men established for the administration of peace and justice within a determined territory, by way of force[23]," if we may assume that the "administration of peace and justice" implies, as I think it certainly does, the recognition and enforcement of some general rules (see § 2, pp. 52—56). The "force" spoken of does not, I think, mean the concentration or representation for *external* purposes above referred to (p. 164), but the *internal* power (whether or not placed in the same hands), which must be in readiness to support the administration of justice, if necessary. The expression "administration of *peace* and justice" is obviously worded so as to include the occasional use of what the same author calls *extrajudicial* force in cases of urgent necessity, e.g. riots, insurrections or forcible crimes[24].

Historically, the administration of Justice, with a more or less developed executive of its judgements, may be shewn to have been a "condition precedent" to the formation of

[23] Salmond[2], p. 99. See Sir R. Wilson as cited above, n. 18.

[24] Salmond[2], p. 96. On the check, exercised by the Judiciary in England, upon this "extrajudicial force," and on the occasional employment of a "suspending" or "dispensing" power, see below, pp. 174, 175.

many of the older States, and it is, as I have at least endeavoured to shew, a primary function of all, old or new. I submit therefore that Austin's definition requires some such final modification as follows below, if it is adequately to express the simplest conception of a State. "A State consists of a considerable body of human beings, occupying a definite territory, united by a common administration of justice, and under the control of a common supreme authority, which last is not, in its relation to them, subject to any other authority" (see above, p. 154).

In adopting the definition of Austin with the amendments and additions above suggested, I merely take this as sufficient to describe a Political Association, so far as the purposes of the present enquiry are concerned. There are, of course, other aspects of the State for which this account would not suffice. I admit Bluntschli's contention that the so-called *legal* State of Kant and W. von Humboldt leaves out of sight much of the *ideal* of a State, and does not indeed concern itself at all directly with what he represents as the most important activity of the statesman—care for the material well-being and the spiritual elevation of the people[25]. Some at least of the objects indicated by Bluntschli are recently coming to be regarded—it may be to an undue extent—as the regular and proper functions or ends of the State[26]. But it is *as* a *Rechtsstaat* that it is here considered, i.e. with a view simply to the making of Law and the Administration of Justice. And it is in that point of view that I shall proceed to examine the relations and demarcations of the three functions, Legislative, Judicative and Executive, first explaining the scope of the last named, as it is here understood.

[25] Bluntschli, Theory, pp. 65—67.

[26] The work of Sir Roland Wilson above referred to (note 18) is largely a protest against the present widening of State Action, even in such a matter (ch. 11) as Public Health.

Executive as here understood. Executive in any sense in which the word is generally used certainly covers a wider area than the merely ancillary province of "carrying out" individual mandates or decisions. Bluntschli rather objects to the *name* as inapplicable to *primary* actions of administration or government (pp. 490, 491), but the objection does not seem very important, if we remember that the Executive is always regarded as in itself (see below, p. 189) a *non-initiative* power confined to "following out" principles already settled by customary or statutory Law.

To say this, however, is merely to reproduce, under the term Executive, the difficulties which have been felt in that of "Administrative" Law, and in its use as a division of subject-matter[27]. To these I can but briefly advert, because my object is simply to shew in what sense "the Executive" will be used in the present section.

Among the various definitions of Administration cited in Holland's chapter (16) on Public Law, is one in which Administration was described by Ahrens, as "the exercise of political functions within the limits of the Constitution." And Professor Holland's own views on the distinction between Constitutional and Administrative Law, though somewhat differently expressed, are not unfairly summarised by the late Professor Maitland as a distinction between *structure* and *functions*—a distinction not, however, very easy to draw, as is shewn by present English instances in the passage referred to from Maitland's Constitutional History. Thus regarded, indeed, Administration, as is implicitly pointed out by him (p. 531), would cover even the legislative function of the Sovereign itself. For my present purpose some closer analysis is necessary. Apart from the *subjective* division by *persons*, of a legislative and an executive *body*, to which

[27] See Holland, p. 353; and Maitland's Constitutional History of England, pp. 528—531.

I shall come directly, I must assume a distinction of the legislative and executive functions *per se* and then shew how the latter does occasionally trench on the former (below, pp. 192, 193).

Much of what is ordinarily or frequently included under the heading of Executive will be omitted here. The control, for instance, of foreign affairs and relations, of preparations for and operations in war—important survivals of what was perhaps the final formative element of Sovereignty in general (see above, p. 164)—does not enter into a consideration confined properly to *internal* functions. (See however below, p. 187.)

Within this restricted sphere, however, the idea of an executive *might* logically cover, as Blackstone makes it do (see p. 174), the judicative element, and the two have no doubt been occasionally combined both in the Heads of nascent Political Societies and in some lower functionaries of modern times. But the Supreme Judicative, and the Judicative generally, will be here considered, as I think they are in most works on Jurisprudence, to be a power distinct from the Executive. The latter, therefore, for my present purpose, is a sort of *residuum* of Sovereignty, negatively definable as "all internal exercise of political powers other than the specific functions of laying down general rules (Legislation) and deciding on cases requiring judicial decision (Judicature)."

Thus understood, or thus negatively determined, the Executive includes not only the carrying out of individual mandates or decisions, and the employment, where necessary, of "extrajudicial" force (see above, p. 168), but that administration of the whole internal economy which forms so large and increasing a part in the modern State, and often indeed, as we shall see (below, p. 192), takes the form of subordinate Legislation. The latter fact, rather than an early, but soon decreasing, amount of direct supreme legislation by the head

of the Executive, is one main reason for that department of political power being taken into account here. Another is the power, still surviving in some countries, of the Executive, to facilitate or obstruct legislation even where the Legislative is in the main an independent body. Nor is it an unimportant feature in the Executive that, by the nature of its functions, it is a power more in *permanent session*, i.e. continuous activity or readiness for activity, than the Legislative, or the Judicative either[28].

Divisibility of Sovereignty. The relative priority, in point of time, between a Judicature, with a more or less organised executive power, a predominant Executive, and a Legislative, briefly referred to above (p. 165), is matter of early history, on which I can only speak in an Appendix or in the later (historical) part of this work. For the present all the three functions above mentioned are considered in their normal modern condition, as co-existing; whether combined in one idea under the general name of Sovereignty or, as they are more usually found, *differentiated*, with a corresponding division of the officers or bodies discharging them. This division—the *subjective* separation, as Bluntschli calls it, of the *persons* in whom the different functions reside—has developed itself to some extent in most States of any degree of advancement, whether as a matter of *liberty* (see below) or of convenience; and writers on Jurisprudence

[28] The above is, as has been said, rather a statement of the Executive so far as it is to be considered in the present section than an attempt at definition. A little will be added on the Executive as regards foreign affairs below (p. 187). My main object here is to distinguish between Legislative, Judicative and Executive in internal matters. I should add that neither the ordinary acceptation of the last nor the qualified sense in which it is here used quite correspond with any particular member of Aristotle's triad in Politics, Book 4 (chapter 14, Bekker), of Deliberative, Judiciary and Magisterial. His Magisterial element agrees in great part with the modern Executive: but his Deliberative (*τὸ βουλευόμενον*) includes a good deal besides Legislation—for instance, the treatment of foreign affairs.

accordingly, assuming the division, proceed to ask in which of the three elements—Executive, Judicative or Legislative —the Sovereignty does *par excellence* or more particularly reside.

The question of mutual relation or comparative superiority between the three cannot be considered as satisfactorily answered, in Bluntschli's *a priori* fashion, by simply saying that "a Legislature belongs to the whole body politic, while all other functions belong to particular organs, and, as the whole is more than any of its parts or members, the Legislature is superior to all the other particular powers." A few instances will be given hereafter to shew that the individual developement and relative predominance of the three elements under consideration has varied and still varies a great deal, not only in different nations but at different stages of history in the same nation. For the present I confine myself mainly to illustration from our English Constitution, as affording familiar and authenticated examples[29].

Separation of Powers as a guarantee of Liberty. The three powers or functions above mentioned can be fairly well distinguished from one another in the abstract. It is the "confusion of persons" or rather the occasional exercise of two or even three of these functions by the same person which constitutes the difficulty in concrete instances. The *subjective* division of Sovereign Power is made much of by Montesquieu as a guarantee against tyranny originated by England, and Blackstone speaks in the same strain of our separation between the Legislative and the Executive. Under the latter, however, it must be remembered that he expressly includes "the dispensation of

[29] See generally Bluntschli's chapter (vii. 7) on the Division of Powers. For the caution that we must not generalise too much, however, from English phaenomena, see Dicey's just criticism (Law of the Constitution[7], p. 69) of Austin in this respect.

justice," which is *not* here included under the term Executive[30].

It is easy to decry the optimistic generalisations of Blackstone such as that in the well-known passage here quoted and others[31]. If we accept, however, the particular function, on which he here lays special weight, as representative of executive authority in general, we must admit that the most important English safeguard of *personal liberty*, to which Blackstone obviously refers, *does* depend upon the separation of powers to which he attributes it.

Habeas Corpus and its Suspension—Roman parallels. In the case of our early legal history, as probably in that of Rome and other old nations, the separation of Executive and Legislative, or rather the growth of a new and comparatively independent Legislative, is part of the progress from a practically despotic to a "free" Government. But the "liberty," to which Blackstone vaguely refers, has depended rather, I think, upon the separation and independence of the Judiciary element in particular, and the check exercised by that element on the Executive proper, than upon a separation of the Executive as a whole from the Legislative.

I refer, in this, to the Habeas Corpus Act, or rather the Common Law principle therein recognised and embodied, under which the High Court of Justice can effectually prevent any man in England from being unlawfully deprived of his liberty[32]. To some extent this principle may be compared

[30] Montesquieu, Esprit des Lois, xi. 6, Blackstone i. p. 145. See, to the same general effect, Washington's Farewell Speech, quoted by Bluntschli, p. 492, n. 4. In actual treatment Blackstone's wide Executive is distributed over a good many different parts of the Commentaries, e.g. the Superior Courts of Justice come under Private Wrongs in Book iii.

[31] I refer chiefly to Bentham and Austin who follows so frequently in his wake. The particular passage, however, quoted above does not appear to be attacked directly in Bentham's belauded Fragment on Government, ch. 3, which mostly deals with the Introduction to the Commentaries, § 2.

[32] See, as to the general operation of the Act, Dicey[7], pp. 218—223.

with the Valerian legislation *de provocatione* traditionally attributed to the earliest days of the Roman Republic, which transferred the power of inflicting more serious criminal sentences from the Magistrates to the popular assembly acting judicially. But there is an important difference between the manner in which the necessity, on urgent occasion, of relaxing this check upon the Executive, is treated in the English and in the Roman system. The "power of dispensing with and suspending of laws" generally, which had been claimed by the King, is expressly declared, in the Bill of Rights, to require the consent of Parliament. What is called "suspension of the Habeas Corpus Act" is effected under a Statute passed by our regular Legislative[33]. In Rome, on the contrary, the Senate or the Consuls, who may on the whole be considered as representing the Executive, retained until very late in the Republic the exclusive power of nominating a Dictator—an appointment quite as often adopted for home troubles as for military purposes, and which amounted to the practical suspension of ordinary Law. We may add a rather nearer parallel to suspension of the Habeas Corpus Act, in the direction, exceptionally given by the Senate to the Consuls, *ut darent operam ne quid detrimenti respublica caperet*[34]. I must now pass, however, from the general result, as to Liberty, of a separation between the Executive and the Legislative, to more particular points in respect of such separation.

General supremacy of the English Legislative. The consideration of divided sovereignty, as a guarantee of liberty, has led to a digression from the main question or questions—

[33] See Dicey, ib. pp. 224—226, also Maitland, Constitutional Hist. of England, pp. 305, 306, and for text of the Bill of Rights, Taswall Langmead, Constitutional Hist.[6], pp. 514, 515; Hallam, Constitutional Hist. of England, ch. 15.

[34] As to the appointment of a Dictator, *in asperioribus bellis aut in civili motu difficiliore*, see Mommsen, S. R. ii. 142, and further 148—151. On the *videant consules*, &c., ib. iii. 1244, 1245. See too below, note 41.

for they are two—in general Jurisprudence, which I propose to illustrate by the facts of English experience. They are these: Can the Executive, as a body, be definitely marked off from the Legislative; and, if it can, which, if either, is superior to the other?

Both of these questions are answered, with an enviable distinctness, by Blackstone. As to separability, the Executive, we are told, consists of the King alone; the Legislative, "to wit, the Parliament," of the King, Lords and Commons. As to superiority—in spite of the inconsistencies alleged by Bentham[35], which may occasionally be traced to Blackstone's optimism, or love of encomium at all costs, it is perfectly clear, even from the passage specially selected for criticism, and still more from others, that, in England, the *legislative* power vested in Parliament is regarded by him as the Supreme and absolute authority of the State. This is the more noteworthy because in Blackstone's time, as still more in earlier English history, distinctly legislative powers, besides an independent Executive, might correctly be attributed to the Crown.

It is not within my present purpose to go into the ancient history contained in Blackstone's chapter 6, "Of the King's Prerogative." Many of the powers there attributed to the Crown have already been appropriated, delegated or superseded by ordinary legislation[36]. Others, though formally left in

[35] Bentham professes to find under Blackstone's assertion of *an* Executive power lodged in one person (the King) an incongruity with *the* supreme power, "the only power our author has been speaking of all along until now," lodged in King, Lords and Commons. But if we compare Blackstone, Introduction, § 2, p. 51, on which Bentham's criticism is mainly written (Fragment, pp. 70—74), with Comm. i. 145, 160, 161, &c., we shall see that Blackstone never does recognise any *other* "supreme power." Neither he nor Bentham speak of "executive sovereign power" as Austin in Lect.[5] 6. 249, St. 98.

[36] See Dicey[7], pp. 7—11, and Lowell's Government of England, ch. 4, on the Executive Departments; also Maitland on the distribution of executive

the hands of the personal Sovereign, are exercised, or their exercise virtually controlled, by members of the Ministry for the time being. Probably, to use Prof. Dicey's words, "no modern lawyer would maintain that they could not be regulated or abolished by Act of Parliament[37]."

This virtual endorsement of Blackstone's view is not in terms accepted by Sir William Anson, who maintains that the English executive power now belonging to the Crown in Council is another Sovereignty by the side of the Legislature, so that, however complete the present "harmony," produced by the political position of the motive power behind the Crown, may be, there is still a real *dualism* in our Constitution. That assertion, however, may still be qualified by a former admission of the same author, that the constitution of this "executive Sovereign" *can* be changed by the legislative authority[38]. The latter might therefore fairly be said to be considered, by both our Constitutional authorities, as *potentially* the true Sovereign[39] though it certainly does not exercise Austin's "habitual control" over our Executive.

The Cabinet. It is difficult to say how far some of the so-called fundamental principles of our Constitution must as yet be relegated entirely to the domain of legal theory. As a matter of fact and practice, the body which does exercise habitual control over our Executive, in the main, is the

power and on the classification of the powers of the Crown in the England of to-day (Constitutional Hist. pp. 416—418, 422—430). One must admit that such a sentence as "the executive power is in the King and is exercised by the Ministry" requires to be corrected or explained in detail (see Maitland, l.c.); but, for a general statement, it may, at least as to the latter part, have its use and convenience.

[37] Dicey, ib. p. 61.

[38] Anson[4], Vol. i. Int. p. 4, compared with Pt. i. edn. 2, p. 38.

[39] So Professor Brown holds that the King, as legally head of the Executive, or supreme executive power, is yet subordinate to the King and the other members of the supreme Legislature, Brown, p. 136, see too pp. 174, 175.

Ministry, or rather the Cabinet, either as a whole or through the individual members of whom it is constituted: the Ministry again being the creature or representative of a majority in the House of Commons. Directly administrative duties fall, of course, more to permanent officials or parliamentary under secretaries: but the ultimate authority and responsibility belongs to the Heads of Departments, who are members of the Ministry and, for the most part, of its inner circle, the Cabinet[40]. Hence we often find very positive statements made, in Parliament and elsewhere, about the supremacy of the Cabinet over the Executive, coupled with the responsibility of the Cabinet to the House of Commons; statements which almost amount to a claim that the Executive in England, with the few possible exceptions noted hereafter, belongs exclusively and absolutely to one branch of the Legislative. Now the ordinary exercise of the powers and functions of our Executive does undoubtedly belong to the Cabinet or the Ministry; and the control exercised by the Ministerial Heads no doubt includes a liberal power of *interpreting* the legal rights and duties of their respective Departments, under advice, if necessary, by the legal officers of the Crown—also Ministerial nominees. But it is presumed that no Ministry would venture on any material innovation in the powers or functions of our Executive without the consent of Parliament as a whole.

In a general sense, then, the present English Executive is what Professor Dicey calls a Parliamentary one (see below, p. 180), and subordinate to the Legislative. A certain fusion of the functions of legislation and administration in the person of minor authorities will be noticed below (p. 192) under the

[40] See Lowell, op. cit. chapters 3 and 4, particularly pp. 55, 77, 79. The Cabinet system is often called, from the relation of the Cabinet to the majority in the Lower Chamber, Responsible Government; a somewhat ambiguous if not misleading expression, see above, p. 158.

head of *subordinate legislation*. Here there remain only a few doubtful questions to be considered with regard to the theoretical repositary of *supreme* executive power.

Prerogative. Certain Royal rights, of the nature of Executive, in the wider sense, remain under the vague name of Prerogative, in which the volition of the individual king is still, or appears to be, a reality. But, as the refusal of assent to a Bill, which was once an actual part of the Prerogative, has long been obsolete, so I think the prevalent tendency of many constitutional theorists is to regard the Prerogative as having become, to all intents and purposes, an instrument of the Cabinet or Prime Minister. One of the rights in question certainly was exercised, on a well-known recent occasion—abolition of purchase in the Army—without the consent of the Legislative *as a whole*, at the instance of the Ministry. This act might perhaps be regarded as the evasion of a difficulty, acquiesced in because not on a matter of absolutely vital importance. A more serious case was the proposed creation of new Peers sufficient to bring about acquiescence in the case of a deadlock between the House of Lords and the House of Commons. This employment of the Prerogative is, for the time, rendered unnecessary by recent legislation: but the question belongs rather to the general and larger subject of Bicamerality—which will be considered below (pp. 204—225). In two other cases where the personal volition of the individual Sovereign seems most likely to come in—dissolution of Parliament and choice of new Premier—it may be shewn that these acts practically depend upon the advice of a responsible Minister and the will of a majority in the Commons[41].

[41] On these last cases see Anson[4], Vol. ii. Pt. i. pp. 36, 37, 48, 49. As to the exact manner in which the Prerogative was employed on the question of Army Purchase, compare Dicey[7], p. 463, n. 2, with the words of the warrant given in Anson, ib. App. p. 261.

Parliamentary and non-Parliamentary Executives. It is obviously not so much in respect of a power, presumably possessed by Parliament, to change the Constitution of our Executive (above, p. 177), as in the nomination of a Ministry which actually controls the exercise of executive powers, by the predominant partner in our Parliament, that Professor Dicey calls ours virtually a Parliamentary Executive. He ranks it, in this respect, in the same class with the Executives of Belgium, Italy and the present French Republic, as distinguished from those of the United States and the German Confederation[42]. Into the case of Non-Parliamentary Executives the question of Cabinet or Parliamentary control does not enter, they being independent of either. These cases of approximation to a dual Sovereignty will be considered directly.

Meanwhile, to return to the two questions submitted on p. 176, an affirmative answer to the first has been rather assumed, viz. that the Executive *can* be, broadly and as a whole, separated from the Legislative, our enquiry turning rather on the point to which, if to either, Sovereignty should more properly be attributed. To the occasional overlapping of the one or the other, as illustrated more in detail by our own legal system, we shall come presently (p. 189). The above assumption, however, being made, I think we may say, in answer to the second question, that when a permanent and ordinary function of making Law for the State at large has once come to be vested in some definite body within a Political Association, that body does generally tend, under

[42] Dicey[7], pp. 487, 488. In the non-Parliamentary class may also, according to his view, be placed the Executive of Switzerland, which, so far as it can be attributed to any distinct political unity, should perhaps be identified with the Federal Council. For this body Professor Dicey claims a real though not an express or *legal* independence, resulting mainly from the substantial *permanence* of the body in spite of its being elected every three years by the Federal Assembly. See further below, p. 182.

normal circumstances of developement, to acquire superiority over those exercising other functions. Present experience, however, as well as past history compels us to admit important exceptions or interruptions to this normal course of developement, sometimes matter of survival or pattern from a previous state of things, but more often due to external exigencies.

In our own case an original unity of Legislative and Executive was followed by a gradual differentiation; later on by a conflict between the differentiated elements; ultimately, through operation of our Cabinet and Party System[43], by the present working harmony between the two powers, which leaves the question of equality—or supremacy—somewhat academic. If it has to be answered, the utmost, I think, which could be claimed for our Executive will be a theoretically *dual* position by the side of the Legislative: most modern writers would rather attribute Sovereignty to the latter *sans phrase*.

In an "unwritten" Constitution like ours, there is of course room, not only for growth and change but for considerable variety of opinion as to the present relation of different constitutional powers. With the greater part of modern Constitutions the functions and provinces of the different supreme authorities are definitely set down in an Act of Legislature, by which in general some machinery is expressly provided for amending the Constitution. Here, the ultimate constituent authority would seem to be pointed out as Sovereign, though only perhaps in its rare manifestation as a *Deus ex machina* for exceptional necessities, see below, pp. 241, 269, &c.

For current working operation the ordinary Legislative seems to be in the majority of cases fairly recognisable as the Head. But, as has been intimated above, in the conspicuous

[43] See Anson[4], Vol. i. 42 and the chapter (8) on the Executive and Legislative in conflict.

instances of America and Germany, the existence of what almost amounts to a true dual Sovereignty of Executive and Legislative is not found incompatible with modern conditions. On the powers of the American President and his Ministry, which is called the Cabinet but differs most materially from the English body so named, I would refer to the excellent description in Bryce's American Commonwealth, chapters 6 and 7; an interesting comparison being also drawn, in chapter 25, between the American and the European system in general. For, even in Germany, Mr Bryce recognises a Sovereignty of the Legislative, though less complete than in the other European systems[44]. In the Constitution of the German Confederation, we have not, as at least it seems to an outsider, exactly the case of an Executive compared with a Legislative. It is rather that of a Monarch who, as Emperor, has charge of military and foreign affairs, and who, as King of Prussia, has, through his appointees, the Chancellor, the Prussian delegates, &c., a practically direct share in both legislation and administration: thus in his single person comparing, and that not disadvantageously, with all the other powers of Government put together[45].

The position of the Federal Council in Switzerland referred to in a previous note (42), is so unique in its general relation to the Legislature (the Federal Assembly), in its lack of direct administrative power and, on the other hand, in its great influence both on administration and legislation; that, while it might be defined, in comparison with other

[44] Bryce[3], i. 278. The book was written (1888) and revised (1893) well after the settlement of the German Constitution and its amendments in 1873.

[45] See Lowell's Governments and Parties, &c. i. 273—280; also Laband, Staatsrecht des Deutschen Reiches, i. § 26, pp. 210, 212 and Meyer, Lehrbuch des D. Staatsrechtes, §§ 123, 124. There is some significance in the mere fact that the Confederation (*Bund*) is to be called a *Reich* (Kingdom) and its President an Emperor (*Kaiser*). See Prologue and Art. 11.

governmental bodies, as something between an Executive and a Cabinet, and is also periodically elected (for three years, by the Federal Assembly), it is in effect more like a standing non-party Advisory[46] and may be left for the present out of consideration.

In the two more definite modern cases of dualism or semi-dualism between Legislative and Executive, an outsider may be mistaken in perceiving signs of somewhat unstable equilibrium. But, though matters do sometimes appear to be tending either to a unification of powers or to a break-up, the *modus vivendi* is for the present a continuing fact. With regard to the American system, the relation of the Executive to the Legislative, however English precedent may have been originally followed, is now much the reverse of that which prevails in England and in the majority of European States. The President, representing the Executive, whether we consider him, in Mr Bryce's words, an enlarged copy of the old State Governor or a reduced and improved copy of the English King, has been repeatedly in sharp conflict with Congress, and by no means unsuccessful conflict; so that the Presidency has come to be regarded, not only by outsiders but amongst Americans themselves, as tending practically to become the superior if not the supreme power in the American Polity. This tendency however is no doubt interrupted and checked by the periodic change in the personality of the Head[47].

[46] See Lowell, Governments, &c. ii. 193—202, 207. He considers the Federal Council as corresponding rather to the President of the United States than to any collegiate body. From his and Professor Dicey's description, this may be regarded as an almost ideal institution, which other less favoured nations might well copy, but which one would scarcely expect its own country to endanger by submission to popular election. See however Dicey[7], appendix, note iii. p. 488: also below, p. 213.

[47] On the difference in the American Constitution generally from the English, because framed on the model of the latter *as conceived by Montesquieu*, see Egerton, Federations and Unions in the British Empire,

In the more permanent tenure of the most exceptional European case—the manifold Constitutional position of the German Emperor—would seem to lie the means of acquiring an accumulation of real power, something like that accumulation of indirect influence which long reigns have occasionally given to English Sovereigns, but far more effective and of far more doubtful benefit. In what extent such acquisitions can be transmitted to a successor depends, as in the American Presidency, upon the personal element. Meantime the present very near approximation to a military Monarchy in Germany is by no means regarded on all hands as internally stable[48]. Originating out of the requirements of one international struggle, it is perhaps mainly held together by the prospect of another and a more terrible one. I would, however, leave for the present the portents and omens of modern Europe, and turn to a historical illustration of the relations of Legislative and Executive in the safe distance of the Roman Republic.

Roman Legislative and Executive. Of the earlier constitution of Rome and the mutual relation of the various departments of Sovereign I can only speak here in general terms. Under the more historical kings, if we disregard the obvious anticipations, by our authorities, of Republican practice, the probable fact is that the executive and judicial functions, together with such legislation, if any, as took

p. 90. On the power and position of the President in particular see the chapters of Bryce above referred to (p. 182) and also ch. 117 (ii. 846, 847). The same author speaks in his "Studies" (i. 420) of the advisability of "dispensing with" the re-eligibility of an acting President. Lowell (ii. 321) would seem to regard the actual nomination of the President by "conventions" as likely to obviate all danger by precluding the election of powerful personalities: but this expectation is scarcely justified by recent experience. See also, on the growth of the Presidential powers, ch. 2 of The new America, by Beckles Wilson. The present question is, of course, an entirely different one from that of Interpretation of the written Constitution by the Judiciary (see below, pp. 197, 198).

[48] See Lowell, Governments, &c. ii. 52—57, 63—68.

place, were united in the sole Sovereign; the Senate, apparently a very ancient body, being temporarily reduced to insignificance. On the expulsion of the Tarquinian dynasty and the establishment of a Republic, the first and second of the above functions were nominally left to the two new chief Magistrates—the Judiciary being much narrowed by the removal of the more important criminal cases to the tribunal of a popular assembly, and of the decision on civil cases to private referees. The new Magistrates, being *annual*, were undoubtedly whether as Judges (*judices*), Generals (*praetores*) or Takers of Counsel (*consules*), much under the revived influence of the Senate, a fairly *continuous* body, although liable to an occasional and ultimately periodic revision (see below, p. 205). To that body, after all allowance made both for the somewhat abnormal institution of the Tribunate and for the regular authority of the Consuls, we must on the whole attribute the practical Executive of the Roman Republic.

Legislation, if any, in the earlier years after the expulsion of the Tarquins, would seem to have been formally effected by the Chief Magistrates: the Code of the Twelve Tables being probably the first instance of legislation by the *populus* or body of citizens at large. This body was thenceforth the Legislative, but came to be variously marshalled, under a more aristocratic or plutocratic system on the one hand, under a more democratic one on the other, both being subject to more or less of checks and formalities, employed mainly at the instance of the Senate. Hence the two different sets of Laws, in the end of equal validity, the *Leges* and the *Plebiscita*. With these began to come into effect certain Resolutions of the Senate (*Senatus Consulta*), which were originally confined to matter of administration or public order, as arising from the connexion of that body with the chief Magistrates, but ultimately came to deal also with

substantive Personal and Property Law. The co-existence of these three bodies of Statute Law is one remarkable feature of the Roman Republic. Another is the practice adopted by the Praetors (as Heads of the Administration of Justice) of issuing Edicts, which, though ostensibly rules of Procedure, were in effect general Law, because they practically conferred new legal rights or imposed new legal duties upon citizens at large.

With the exception of this last, which was not formally legislation at all, and of the overlapping in the matter of the *Senatus Consulta*, the Sovereignty of the Roman Republic was divided between an independent Executive and a Legislative issuing a double series of enactments originally of a somewhat discordant character. The closing scene of the Republic was, as I interpret it, a struggle between these two elements of Sovereignty, both using their powers in an extravagant or factious manner—between the executive power extrajudicially (see above, pp. 168, 175) employed by the Senate on the one hand—and class legislation, represented at least as disorderly and irregular, on the other. This legislation, which, whether prompted by philanthropy or ambition, was certainly what a well-to-do class would generally call socialistic, became possible from the "democratisation" of the popular assemblies, since the reforms of Ap. Claudius and afterwards of Flaminius. In the end, not only, both for the one and the other of the Comitia, had the franchise qualification been changed and lowered, but all former checks, in the interest of wealth, birth or distinction, had been eliminated altogether or reduced to parliamentary artifices open to either of the two new Parties—the Senatorial and the Popular. The result was, as we know, a series of sanguinary *coups d'état* culminating in civil war, and ultimately in a veiled despotism acquired by the head of the military power.

Executives as to foreign affairs. The *external* powers (above, p. 171), which are not here taken into consideration, of an Executive, are, it need scarcely be said, of extreme actual importance; and of almost equal importance is the necessity, or at least the advantage, of their being kept clear of any immediate interference or reversal by the Legislative. The latter, of course, is a principle of *policy* rather than of Jurisprudence: but usage in the main conforms to it. I would refer the reader, for English Law on the subject, to Sir W. Anson's chapter on the Crown and Foreign Relations (Pt. ii. ch. 6), particularly the 3rd section on War, Peace, and Treaties. A few words, however, may be allowed here on the difference in this respect between Parliamentary and non-Parliamentary Executives.

Our own, belonging to the Parliamentary kind, is obviously amenable throughout to influences which cannot by any means have the same restraining weight with such powers, of the other class, as enjoy a comparatively free hand, notably in dealing with the important question of Peace or War. I leave out of consideration the somewhat unique case of Switzerland. Nor shall I stay to compare minutely the absolute power of the German Emperor, in this respect, with the real effects which may quite possibly result from that of the American President; although, in the latter case, the formidable influence placed in a single hand, due perhaps originally in the main to a fear of foreign dangers, is nevertheless not extended to declaration of war, which belongs to Congress[49]. The following remarks are therefore only of a general character.

[49] As to the former see Verfassung des Deutschen Reichs, Art. 11 (Lowell, Governments and Parties, ii. 360 and Laband, Staatsrecht des Deutschen Reiches[4], i. 209; ii. 131). As to what the American President, or his Secretary of State, may easily do towards provoking war see Bryce[3], i. 34. Colombia e.g. was of course a small and comparatively unimportant State: but, in dealing with a stronger power, the United States might be involved

The ambition of Princes or Presidents, however it may be regarded in talk as mere matter of school declamation, is no obsolete matter in fact: so that it might be interesting to consider how far Cowper's suggestion that "War's a game which, were their subjects wise, Kings would not play at" would find any realisation in face of a free Executive at the present day.

The responsibility of advisers, and the possibility, at any rate, of exile from political power, for a temporary President or a removable Ministry, in case of a disastrous war, will always secure a modicum of prudential counsel to the most wrongheaded and autocratic Executive. But the most effective check on a gratuitously warlike foreign policy lies in the tightening of the national purse strings, where the nation is substantially convinced that a particular branch of preparation for war is really unnecessary. The possibility of such a check being exercised by an International Combination of Industrial Unions has been suggested in a previous section (§ 2, p. 90), and the interest of the Industrial Class is generally considered to be against War. In very recent experience, however, the efficiency of this proposed combination has proved, even for the ordinary objects of such unions, very doubtful; and it is far more doubtful whether it would have any effect against the patriotic feeling which members of the Industrial Class generally shew, in spite of their leaders, when their country is once brought, whether from bad management, personal ambition, or unavoidable necessity, to the verge of war.

Overlapping of Legislative and Executive. To return,

in awkward results, from such conduct, presumably within his competence, as ex-President Roosevelt is reported to have thus described: "I am interested in the Panama Canal because I started it. If I had followed traditional Conservative methods I would &c. &c. But I took the Canal Zone, and let Congress debate: and, while the debate goes on, the Canal does also."

however, to matter of *internal* functions. Here, the distinction between a Legislative and an Executive, which can on the whole, I submit, be fairly and usefully drawn, is subject, as has been admitted, to partial or occasional overlapping. Instances have been given in the case of Rome; and Bentham follows up his criticism of Blackstone mentioned above (p. 176) with a rambling tirade against the English Executive, in the wide or general sense, as distinguished from the Legislative, partly on moral or utilitarian, but more on logical or technical grounds (Fragment, 3, § 5). Austin follows in the latter line, maintaining that much English legislation is in itself of an administrative or executive character; that, not only in England but elsewhere, judicial powers, usually deemed executive or administrative, have been exercised by the supreme Legislature or parts of it; and that the King as head of the Executive does in fact exercise a vast amount of what must be deemed legislative power. His own point of view is that, of all the larger divisions of political powers, that into *supreme* and *subordinate* is the only precise one [50].

This ultimate conclusion of Austin has been much criticised. Professor Brown in particular, his usually admiring editor, has indicated, in an excellent note, the general differentiation, in principle, between legislative, executive, and judicial functions; the need, in practice for a corresponding differentiation of organs; and the incomplete realisation of the latter. He retains, however, the text of Austin, on which I may add a few remarks.

Much of Austin's argument relies upon what was, even in his own time, past history; and the ground for the last of his three objections, against differentiation as a fact, has become, for the most part, obsolete. Such direct legislation, as was nominally the act of the King, is now, where not expressly transferred to the ordinary Legislative, admitted to

[50] Austin[5], 6. 249—251. See Prof. Brown's note, pp. 131—136.

be exercised by the Ministry, the creature of Parliament or of the predominant partner in the Parliamentary firm (see above, p. 178). That *the King* legislates *indirectly*, through judge-made Law (Austin, l.c. p. 251), is the merest academic fiction.

That much English Legislation partakes of the administrative or executive character is true—we might indeed call it a truism. This does not of course prevent its retaining intrinsically the *direct* law-making character of legislation proper: but it does give rise to some questions as to *subordinate* legislation, which will be considered presently.

Lastly, the fact that acts of an administrative or of a judicial character may be performed occasionally, or on certain classes of exceptional occasions, by a Supreme Legislative, is rather an indication of Sovereignty in the latter than an argument against the general differentiation of functions. In our English practice, the particular confusion of different powers referred to occurs mainly either in individual cases of urgency or in the utilisation of survivals from an earlier and less differentiated stage of political developement. To the former class belongs the "suspension of the Habeas Corpus Act" referred to above (p. 174), although this is not so much an act of Executive assumed by the Legislative, as an act of the latter modifying its own previous legislation in favour of the Executive. With this may be coupled the passing of Acts of Indemnity; which, although it has at first sight the look of an encroachment on the judiciary function, is really either a necessary sequel to the suspension above mentioned, or, in a more frequently recurring use instanced by Dicey[51], a half-hearted repeal of obsolescent penalties.

[51] For Suspension of the Habeas Corpus Act see Dicey[7], pp. 224, 231; for an Act of Indemnity as sequel to such Suspension, pp. 228—231; as passed to free Dissenters from penalties for accepting municipal office without qualifying by taking the sacrament, p. 47.

The various judiciary functions formerly exercised by one or both Houses of Parliament, to which Austin refers, were, as Sir William Anson shews, probably portions of a jurisdiction delegated by the Crown, while the Crown was yet truly Sovereign, to the old Curia Regis. Of these the Appellate Jurisdiction of the House of Lords is now the sole survivor in actual practice. Its connexion with the Legislative is also, since the Appellate Jurisdiction Act, apparent rather than real, as the Court consists only of Law Lords, though it retains the forms of a motion in the House[52].

Of the Roman instances mentioned by Austin, the union of all political powers in the Roman Emperor is undoubtedly an actual fact of despotic government, which is never likely to have any very wide existence among modern civilised nations. It is to such cases as this that Montesquieu and Blackstone refer, when they speak of separation of powers as a guarantee of liberty. For although the coherence of a State at all is scarcely conceivable without some recognised general rules of conduct (see p. 165), the regular administration of rules has but an unstable foundation where all powers of Sovereignty are united under one sole head.

The Criminal Jurisdiction *in libera republica* of "the sovereign Roman people, then the supreme legislature" (Austin l.c.), which was in fact only delegated to regular criminal Courts late in the Republic, has been briefly noticed above (p. 185). It was probably not so much the employment of a body primarily legislative for judicial purposes, as the survival of an assembly originally "assisting" at the trial of great offenders and afterwards organised into a Legislature. At any rate its judicial employment in historical times was apparently of so exceptional a character as to resemble rather an English Impeachment or Act of Attainder than the proceedings of a regular Judicative. The causes, however,

[52] Anson[4], i. 368.

of this cumbrous machinery and its probable results, in the exclusively private prosecution of many of what we should consider Public wrongs, are matter for the later volumes of this work.

Subordinate Legislation. In speaking above (p. 190) of English Legislation, which is in itself of an administrative character, I did not so much refer to such legislation, where effected directly by the supreme legislative authority, as to the case—of comparatively late developement but increasing occurrence—where rules of conduct are laid down by authorities primarily judicial or executive.

In the former of these modes of enactment (which of course must not be confused with judgements operating as precedents) the rules in question *might* practically amount, as they did in the Roman Praetor's Edict, to the passing of ordinary Substantive Law. In modern times, however, they are mostly confined or intended to be confined to real matter of Procedure, e.g. the Orders and Rules of the Supreme Court of Judicature in England.

On the other hand, the rules laid down by bodies primarily administrative or executive, such as Boards, Commissions, Councils, &c., are year by year—particularly in our modern England, with its notable increase of what has been called *paternalism*[53]—more and more conspicuously modifying the ordinary rights and duties of the citizen at large. This kind of legislation is, no doubt, subordinate, and subject to general limitation within the powers conferred or created by the Supreme Legislature; so that the bodies exercising it might be regarded by Jurists as mere delegates,

[53] Professor Lowell, on the subject of Board legislation and Delegation of legislative power generally (Government of England, i. pp. 110, 363, &c.), speaks of this increasing subordinate legislation, by administrative bodies, as a notable departure from the old Anglo-Saxon tradition of local self-government, with a distinct approach to the practice of Continental countries.

and their rules as part of the Law of the Land. But, in the inevitable multiplication and complicity of such rules, their incidence upon the private individual results in a growing feeling of worry and insecurity, with a considerable diminution in that "Knowledge of the Law" which the ordinary citizen is theoretically assumed to possess and to which plain common sense and ordinary ideas of Right and Wrong might once be a fairly adequate key.

Not to deal in mere generalities, I may refer to such rules as those of the "permissive orders" by local authorities originally proposed in the Shops Bill of 1912; the power to make regulations given by the Public Health Acts generally; the constantly changing regulations and requirements under the Board of Education; and the very extensive powers, to form schemes and to make and enforce regulations, given by the recent Housing and Town Planning Act[54].

The point of view from which subordinate legislation should, in accordance with the general plan of this work, be regarded, is mainly one of *form*, not of principle or object. The view of principle which *is* indicated here may be admitted to be rather the individualist than the socialist one. That is, individual rights of liberty and private property are assumed as *primary*, and what we are now considering as *interferences* with those rights, in the public interest. It seems clear that such interferences must go on increasing, at any rate in connexion with the advance in medical and physiological science. The question, for reasonable legislators, would appear to be, how the regulations, empowering and limiting these interferences, can be made and administered with the smallest amount of annoyance and the greatest amount of intelligibility. As an ideal might be suggested: Rules short, general and clear, drawn up by a competent central authority, with little if any allowance of local variation

[54] See Hazell's Annual, pp. 132, 370, 398, 413, 414, &c.

as to principle, but with a comparatively free power of administration allowed to the local officer. This would at any rate render possible some knowledge by the ordinary citizen of the more prominent modifications of his primary rights and duties, by legislation[55], which is, as it seems to me, unavoidable, though it might surely be better done than in the patchwork way of too many of our Acts of Parliament. How far simplicity and generality of rules might give opportunity for arbitrary or corrupt official administration, and how far this can be obviated, by our ordinary means of redress, is a question for experience: but I fear that a recurrence to the "Province of the State," as limited by Sir R. Wilson, does not seem probable or possible.

Droit administratif. The new rights and duties created by administrative legislation, if not obvious to the ordinary mind, are, at any rate in countries such as ours, where what Professor Dicey calls the "Rule of Law" obtains, *equal*. They are not matter of privilege but are subject to being compared with and checked by the Common Law of the land, customary and statutory (including of course the originating or empowering enactment) in our ordinary Courts. This is not so in all countries: so I may here refer, by the way, to a principle foreign to English Law, differing indeed from mere subordinate executive legislation but tending much more towards an aggregation of independent power in the Executive as a whole.

I refer to what is known in its bare literal translation as "Administrative Law" but which, in regard to its most noteworthy effect, might be better stated as "the special position of State Officials." This institution, though to be found, as we shall see, in other continental countries, has had a specially interesting developement in France, where it was nominally abolished in 1870 but appears to be still the Law

[55] This subject is treated more fully in later sections.

of the land, by virtue of a series of judicial decisions. We have here, I may remark by the way, a good example of the growing formation of Case Law on the Continent—due however more perhaps to Text-books and Commentaries than to Reports. The main feature of the institution in question is the privileging of officials by exemption to a considerable extent from the operation of that ordinary "Rule of Law" to which like other citizens they are amenable in England. For further detail on the subject I must refer to Professor Dicey's last edition of the Law of the Constitution[56].

It must be admitted that the abuse of *droit administratif* is not without its manifestation, as yet somewhat rudimentary, in our own country. I refer to the occasional exercise of judicial powers by departmental officials, without allowing any appeal. Whatever saving of time and expense this may, at first sight, effect: the result, in debarring true judicial enquiry in open Court, is very questionable. It would certainly seem better to penalise appeals on false or inadequate grounds than to forbid them altogether. This is, in my opinion, a real *gravamen* against what is often somewhat indefinitely complained of as bureaucracy. The multiplication of officials is a different thing and rather an offence against the morale and the purse of the taxpayer than against his liberty, as this may come to be.

The Judicative and the Legislative. In speaking above, on the divisibility of Sovereignty and the superiority, or otherwise, of one division over the rest, I referred to the opinion of Sir W. Anson as to a dualism, of Legislative and Executive, in our English Constitution (see pp. 177, 181). Professor Salmond, who agrees with this opinion, goes further

[56] Dicey[7], Pt ii. ch. 12. See, in particular, as to the above foreign evolution of a Case Law, pp. 369—371. An amusing recent instance of the manner in which "respect for the uniform" could be exploited in Germany was the "Kupenick robbery." See Stimson, "Popular Law-making," p. 36.

and allows to the English House of Lords, in virtue of its supreme Judicature as a Court of Appeal, a Judicial Sovereignty[57]. On a question of mere terminology, I should not go out of my way to differ from so respected an authority, by submitting that a supreme Judicature is not exactly the same thing as a Judicial Sovereign (see above, pp. 173, 174). But I take Professor Salmond distinctly to mean that in his trinal Sovereignty "none is afore or after other," whereas I hold that, normally, the Legislative is "afore" the other two Persons. In the particular instance of England the recent regulation of the procedure of the House of Lords, as a Court of Appeal, by the Judicature Acts, seems proof in itself of the superior authority of the Legislative over the Judicative[58].

To pass to a more general view of the subject—it has been shewn above (§ 3, pp. 114—125) that the Judges of some, if not most, states exercise a real, though unacknowledged, power of legislation, by way of *interpreting*, which often means *varying*, existent Law so as to suit the changed requirements of their time. This power depends, of course, upon the amount of regard paid, in the particular state, to *precedents* or to *prudential literature*[59]. And it would certainly seem that, at the present day, modification in Law, resulting from records of judicial decision, is making its way in other countries besides England and America, of which Case Law has been hitherto rather the specialty. We shall see below (pp. 251, 252) how not even written Constitutional Law is exempt from the operation of this agency. At present I wish to speak briefly on a particular claim of equality, or rather superiority, for the Judicative as against

[57] Salmond[2], App. ii. 475, 476.

[58] Appellate Jurisdiction Act of 1876, &c.

[59] See above, § 3, pp. 123, 124 and, for a fuller consideration, cf. § 8 on the modern *jus non scriptum* and § 9 on Text-book writers.

the Legislative, which has been set up in the case of America.

True Interpretation, even in its extended or *logical* rather than *grammatical* sense (above, § 3, pp. 121, 122), makes of course no pretension to the *initiative* function of Legislation proper, being admittedly of a subordinate or ancillary character[60]. The Supreme Federal Court, however, of the United States, has been sometimes credited with a power of "controlling the Legislature," or, in somewhat more specific terms, has been styled the Guardian of the Constitution as empowered to "annul bad laws."

The true value of these statements has been well set forth by Mr Bryce. The Supreme Court in America has no doubt attracted special notice, partly from its being the highest Court of Appeal in a country of very advanced developement, partly from the ability and fairness with which its powers have, on the whole, been exercised. But the particular function in question is common to all the American Courts; it is strictly and properly judicial; finally it may, though it need not necessarily, exist in any country in which the ordinary Legislature is *not* supreme, as that Legislature *is* e.g. in France and Germany (see below, p. 199).

Wherever there is a "written" Constitution, which does not distinctly allow of its own alteration by the ordinary legislature (see below, pp. 239, 240), there must be a superior and an inferior degree of Law[61]: in a Federal State there will be several of such degrees. The order of superiority for instance in American Law is as follows: (i) The Federal Constitution; (ii) Federal Statutes, i.e. Statutes made by

[60] See Dicey[7], p. 58. For the initiative which is really though not ostensibly exercised in Case Law see above, the latter part of § 3.

[61] For the suggested possibility of conflict between ordinary legislation and some fundamental principle of an *unwritten* Constitution see below, p. 261.

the ordinary Federal Legislative; (iii) State Constitutions; (iv) State Statutes.

Now the competence of a Judiciary to take into account a conflict between a lower and a higher degree of Law, e.g. an Act of the ordinary legislature as against the principles of a Constitution, may or may not be recognised in a particular country; and, if recognised, may (*semble*) be confined to a High or Supreme Court. It is expressly recognised, in terms which apply to all Courts, by the Constitution of the United States, and has been copied, as to the High Court, in the recent Constitution for the Commonwealth of Australia[62]. But this is by no means

[62] "The judicial power" (note the general expression) "shall extend to all cases in Law and Equity arising under the Constitution, the Laws of the United States, and treaties, &c., &c." Art. iii. § 2, Bryce[3], i. 703. See for a number of cases under this article ib. 263—270: for early cases of State Statutes declared invalid, as unconstitutional, by the highest Courts of the various States (which of course the founders of the Constitution had before their eyes) Dicey[7], pp. 151, 161: for a number of similar recent (1907) cases, Journal of Comparative Legislation, xviii. p. 275.

As to Australia: By 63 & 64 Vic. (1900) c. 12, § 76, the Parliament of the Commonwealth was empowered to make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation. This was accordingly done by the Judiciary Act of the Commonwealth, 1903, No. 6, § 30 (Com. Leg. vol. ii. p. 13) and this power of the High Court has been repeatedly exercised. As to whether it may be limited by the possibility of appeal to the Privy Council, on a controversy as to the Constitutional powers of the Commonwealth against one of the States, see the later Act, 1907, No. 8 and the Journal of Comparative Legislation, xx. (1909) pp. 277, 278. In the South African Act of Union, 9 Edw. 7. c. 9, I can find no provision corresponding to the above beyond a clause (§ 98. 3) giving or retaining to the Superior *provincial* Courts jurisdiction on matters in which the validity of a *provincial* ordinance shall come in question. This Act, it must be remembered, contains (§ 152) the power of self-amendment as to any of its provisions but one or two, by ordinary Parliamentary legislation. In the case of the Dominion of Canada Professor Dicey shews that the accordance or otherwise of legislative enactments with the Constitution is here also matter of judiciary decision, but it is that of the Judicial Committee of the British Privy Council. Dicey[7], pp. 161—164. In the case of English Representative Colonies with powers of independent legislation, other than those of Australia and South Africa, the difference

necessarily a part of written Constitutions in general or of Federal Constitutions in particular. It does not exist in France or in Switzerland or in the German Empire, in all of which countries the Legislative is deemed to have the right of taking its own view of the Constitution[63].

On the practical working of this function of the Judiciary, notably in America, I shall have to speak later on. It may suffice to say here that this so-called dominant power of the Supreme Court is merely a fulfilment, by the highest Appeal Court, of a Court's ordinary duty—that of interpreting the Law—in a peculiar and exceptional case, i.e. in elucidating the permanent will of the People, the supreme legislator, expressed in the Constitution enacted and retained by them, as against the occasional enactments which may have clashed with it. It is a power, moreover, which arises *on a case*, not on a political proposal; so that its exercise, with regard to a particular legislative Act, is not a Veto but a decision that the Act was invalid *ab initio*[64]. Provocative cases may, no doubt, conceivably be manufactured, and an unfavourable decision coming very soon after a questionable enactment would certainly have some resemblance to a Veto: but, after all, the action here allowed or entrusted to a Judiciary is in

of superior and inferior Law exists as between Acts of the Imperial Parliament of Britain which are intended to apply to the particular Colony and Acts of the Colonial Legislature. Where one of the latter, although not stopped as it might have been, at the outset, by the Veto of the Crown, is alleged to be in conflict with the former, the Courts not only in the Colony but throughout the British Empire will take note of its invalidity, by way of judicial decision. See the Colonial Laws Validity Act, 1865, and, on the subject generally, Dicey[7], pp. 96—104. On the particular case of the Dominion of Canada and the judicial decisions, ultimately of the Judicial Committee of the Privy Council, on the accordance, or otherwise, of Acts of subordinate legislation, with the Constitution, ib. pp. 161—164.

[63] Bryce[3], i. 250, n. 1. Dicey[7], App. Note ii. pp. 476—479, see too pp. 165, 166. Cp. Lowell, i. 13; ii. 217, 218, 282—284.

[64] See Bryce[3], i. 250—252, 257, 272. As to the want of Initiative in the Judiciary of the United States, see Esmein, Droit Constitutionnel, p. 493.

no sense *initiative*. It seems clear then that no superior or even coordinate power of a Judiciary as compared with a Legislative can be established by provisions such as those above cited. Here, however, I must leave the subject, and pass to that of the different forms of Sovereignty, as a whole, and its limitations, particularly such as relate to the Legislative.

Monarchy, Aristocracy and Democracy. Sovereignty has been hitherto considered as a combination of different functions which are usually found in some degree of differentiation and division among several persons or rather bodies. From a different point of view Sovereignty may be regarded as a *whole*, vested either in one person, in a comparatively small class, or in a comparatively large class, though seldom hitherto amounting to a majority of the whole community. The distinction by number is not the sole one, but we may in general terms sort these three cases under the heads of Monarchy, Aristocracy and Democracy.

Historically one or other of the first two forms has, I think, generally preceded the third: but the order is not invariable, nor was Democracy, though at present apparently the reputed *ne plus ultra* of Polities, considered a necessarily final condition by one of the greatest thinkers of the last century[65].

The subject of the different forms of Sovereignty as dependent on these different constitutions of the Sovereign body belongs rather to comparative constitutional history than to Jurisprudence, which, here at least, is confined in scope to the general conception of Law, its Sources in a wide sense, and its modes, forms and divisions. For Aristotle's division therefore of Supreme Power as belonging to *one*, the *few*, or the *many*; for Hobbes' description of Sovereignty as residing in *all*, *one* or *more than one*, and for the applications

[65] Sir Henry Maine, Popular Government[5], pp. 20, 71.

of these and similar classifications to ancient or modern cases I would refer to such authorities as Bluntschli's 6th Book.

A few words, however, must be said on Austin's distinctions under the present subject because of his arbitrary and misleading use of words. As Hobbes' Sovereignty, or Government, of All, is certainly not, if strictly taken, a historical fact, his three categories may be reduced to two, and Austin accordingly classes all actual States under the heads of Monarchy or Aristocracy, the latter word being used in what he calls its *generic* sense, a sense peculiar to himself, and indicating any governing body less than the whole but more than one. It is scarcely worth while to consider how far this strange phraseology may be due to Bentham's banter of Blackstone on the British Constitution ("Fragment on Government," 2, § 29; Blackstone, Int. § 2, p. 49). Anyhow it has to be corrected by a *specific* sense which again depends merely upon a vague numerical proportion of the governing to the governed. If that proportion be *deemed* small the Government is an Aristocracy, if extremely small an Oligarchy, if large a Democracy. Aristotle's triple division of Government is as has been said into that of *one*, the *few* and the *many*, or the *majority*: Aristocracy and Oligarchy are both of the second class but distinguished by superiority or inferiority in point of personal merit and disinterestedness, or the reverse, of object. Of course there is also to be taken into account here the ambiguous use of ἄριστοι, noted by Grote (from Welcker, Grote's History, 1862, ii. 258), as indicating birth and wealth at least as much as merit. Considering the actual Greek cases, we should not be far wrong in saying that Aristocracy was rather the Government of a Class, and Oligarchy that of a Cabal. But in all merely numerical divisions the prominent feature of Aristocracy and the Aristocratic element, as generally understood, is left comparatively out of sight. Its true characteristic is well

given by Bluntschli as being essentially based upon *distinction of quality*, whether by birth, age, prowess, wealth or some combination of these properties[66]. That such an Aristocracy must always be a minority follows as a matter of course.

Most of the civilised Governments of the present day are of so mixed a character that it is scarcely worth while to advert to old discussions on the merits of a pure Monarchy or Aristocracy. The Russian Empire is still nominally an Autocracy, and, if the Constitution of 1905 be a grant resumable, is really so. But the legislative power, or at least the Veto, of the State Duma must presumably tend, as time goes on, to be established on an independent footing, and thus to introduce a democratic element into what has been above regarded as the supreme function of Sovereignty. Both in that country, and in others, there have, of course, been many past instances of absolutely pure Monarchy, including the exercise of legislative power, and only limited by deference to some general feelings of Right, Custom or Religion (see above, p. 166), or, as in the instances cited by Austin (of the Turkish Janizaries and the Roman Praetorians), by the necessity of keeping in good humour a military class.

In the half-dozen pages devoted by Austin to the classification of Sovereignty as a whole, now under consideration, the most useful part is that in which he describes the true position of the King in what is called a *limited* Monarchy. His remarks on this form of Sovereignty, which is still perhaps the prevalent one among modern States, apply equally to the President of a Republic. The so-called

[66] Bluntschli, 6. 19, p. 425. The other passages referred to are Austin[5], 6. 237, 238; St. 92, 93: Hobbes' Leviathan, ch. 19, p. 94; Aristotle, Politics, 3. ch. 7 (Bekker). The triple division of the last is, as Bluntschli remarks (6. 2, p. 213), based not on the legislative but on the administrative power. But the whole Aristotelian distinction has little meaning as a *classification* of modern States, though it will always retain its value, with the rest of the Book, on questions of Political Science.

Monarch or Head is really but a member of a Corporate Sovereign, enjoying powers definitely limited by Law or Constitutional Custom, and, in particular, only capable of legislation, on certain subjects, in conjunction with other bodies of an aristocratic or democratic character. His position may be concluded under the general principle that *any* member, sole or corporate, of a sovereign body made up of several such members is *per se* subordinate to the whole, of which he is merely a limb[67].

Legislative Assemblies. It will be seen, from what has been said above, that in a practical consideration of the present subject, viewed at least with modern eyes, the Aristocratic and the Democratic are rather to be regarded as elements than entire forms of Government (see too below, p. 286). The subject will therefore be most usefully treated with special reference not to mere *numbers* but to what we have agreed to regard, on the whole, as the head *function* of Sovereignty—Legislation (above, p. 181). This function may be and has been exercised by true Monarchies and by true Aristocracies, e.g. at Rome before the Decemviral legislation (above, p. 185): but the case with which I wish more particularly to deal is that of the Corporate Legislature, or Legislative Assembly, in which the People, or body of citizens at large, without distinction of quality, takes, either directly or indirectly, a considerable, though not necessarily the sole part: which I propose to call broadly Democratic Government. This institution has been reached by almost all considerable States, ancient or modern, at one time or another: and the examination of one or two important practical problems connected with it is of more consequence than a discussion whether the Government of the States in question is to be considered, as a whole, Democratic, Aristocratic or mixed.

[67] Austin[5], 6. 241, 256, 257; Bluntschli, 6. 14, p. 371; 16, p. 410, &c.

On these, and indeed on most subjects in the present section, I find it better, as suggested above (p. 148) to work back from modern ideas and experiences and see how far they can be identified with such ancient record as is fairly trustworthy than to start with philosophic maxims and definitions.

The leading ideas which at present claim special attention with regard to Legislative Assemblies are two—Bicamerality and Elective Representation. The latter subject, though in itself mainly, if not exclusively, modern, is closely connected with a theory of Sovereignty, in respect of what we have agreed to regard as its predominant function viz. Legislation, as possessed or exercised by "the People"—which was nominally adopted in ancient Rome, and is becoming in a more real sense one of the great questions of to-day. The former subject, which I shall take first, finds its interest and importance chiefly in the constitution and functions of a so-called "Upper House"—a matter of still more urgency to ourselves at the present conjuncture.

Bicamerality. There have been, in so very many instances of Political Association that we sometimes treat the fact as a general rule, two co-existent assemblies for political purposes: one vaguely identified with the people, or the male portion of the people, at large: the other comparatively small, its membership being determined by one or other of the distinctive qualities specified as those of an Aristocracy (above, p. 202), or by personal selection and appointment. The larger assembly could, it is obvious, only be convened occasionally or at periodic intervals: the smaller *might be* capable of comparatively continuous session and action. It is of the latter body that I propose to speak first, as it is upon the qualifications and functions, of what has usually been called an Upper House, that the present aspect and question of Bicamerality turns: and, in a history of Roman Law, I may begin with the body which has often been

compared, and will in some respects bear comparison, with our English House of Lords.

The Roman Senate, as it has lent its name to many of the modern Upper Houses, so has also no doubt to some extent served for their model, according to the views for the time entertained, of its constitution and functions. The latter we now know to have varied considerably at different periods of Roman History: but we are perhaps justified in believing that by "the Roman Senate" will be most commonly understood that of the generation or generations which conquered Pyrrhus and faced the deadly struggle with Hannibal. Details must be postponed to that part of the following History where we come to enquire into the special effects of the *lex Ovinia*, which I am disposed to place in the latter half of the 4th century B.C.: the following are the main results at which my own enquiry has arrived.

About 250 B.C. the Senate was a body subject to periodic revision and reconstitution by the Censors. These officers, though not confined to the old patrician families, were elected by an assembly in which the representation of property, as against numbers, was still on the whole predominant. The qualification for appointment, as Senator, was in express terms (*optimum quemque*) superior merit. This was interpreted to mean, primarily, public service either in high civil office or in the field: but previous tenure of a seat was evidently continued except in cases of proved incapacity, negligence or misbehaviour: wealth and birth had no doubt also their weight, though such qualifications were certainly not put on a par with those of personal quality and distinction. From a body thus constituted we might expect the dignity, energy and ability which characterised that "assembly of Kings": also perhaps that selfishness and indifference to the condition of the poor which brought about the civil wars and, consequently, the Imperial tyranny.

It is rather as a model of qualifications than as an example of functions that this Roman Senate can be compared with any of our modern Second Chambers. Its most prominent difference in the latter respect is its close connexion with the Administrative or Executive, through the legal Heads of that function, who were bound to take counsel with it and upon whom, from its own comparative continuity, as compared with their yearly tenure of office, it undoubtedly exercised, in general, a great amount of control. It was apparently through this connexion with the Executive that the Roman Senate acquired that independent legislative power which has been referred to already and which constituted another important difference from the modern political bodies which have been often named after and compared with it (see generally above, pp. 185, 186).

The English House of Lords. The members of the English House of Lords are now generally considered to have owed their position, at least from the time of Edward I, rather to summons by the Crown than to mere tenure of extensive landed property or of high office. Yet it was probably due to these two important, if not definitely entitling, qualifications, that the particular hereditary character which had been attached to them (except of course in the case of Ecclesiastical office), became the rule in Parliament: so that the heirs of Barons generally were summoned after them as of right[68]. The question whether the Crown can create a non-hereditary Peerage and whether a Barony by tenure can still exist, were settled in the negative by the House of Lords in the middle of the last century[69]; but

[68] Pollock and Maitland, i. 260, 392; Maitland, Const. Hist. of England, pp. 41, 79, 168, 238; Anson[4], i. 193—196. The ordinary Patent, which has long superseded the Writ of Summons, expressly states the hereditary character of the Peer's right. Maitland, C. H. p. 348.

[69] By the Wensleydale and Berkeley Peerage cases 1858 and 1861, see

Parliament has since authorised the appointment for life, of four Law Lords, which may become a precedent for a similar appointment of others not connected with the law. I omit, for the present, the elected Irish and Scotch Peers.

The creation of new Peerages, and the nomination for Bishoprics entitling to a seat in the Lords, are by constitutional convention in the hands of the Crown. This power is practically exercised by the Ministry for the time being, subject, no doubt, to any distinct objection by the individual King or Queen. Of course it is sometimes abused for party purposes, but on the whole few of the selections in question have been made without some real grounds of personal distinction, e.g. as public servant, trained lawyer, captain of industry, leader in literature, culture, philanthropy or religion. Divers unities of common action or feeling, which must form themselves in our complicated modern life, and which are too crudely lumped together under the depreciatory title of "class interests," thus often find in the Lords a virtual though indirect representation. That a more definite recognition of such representation may become desirable, under a widely extended franchise, by the side of direct election to a House of Commons, I shall endeavour to shew hereafter (p. 289). Meanwhile the personal merit above mentioned must clearly belong to the original creation alone, and the objections against hereditary succession as entitling *per se* to political powers, are obvious enough.

Hereditary succession has also long ceased, in the vicissitude of fortunes, to give any absolute security for the permanent retention even of such influence as might be due to *wealth*, although some substantial amount of property may be required as one condition of the original creation. The special transmission, again, of ability, by primogeniture,

Anson[4], i. 212—214. On the Acts for appointment of Lords of Appeal for life (1876, amended 1887), see Lowell, Government of England, i. 397.

has been of late most vigorously contested (see Mr Temperley's Senates and Upper Chambers, pp. 314, 315) and instances in the other direction can easily be collected from our own political history.

For all this, the hereditary character of Peerage *per se*, as an honour, will probably remain popular, partly from the vague idea, connected at bottom with the House of Lords, that it is an old institution which has on the whole, "worked well"; partly from the more definite one, that it tends to form a nursery of candidates for public service, usually endowed with special opportunities for acquiring knowledge of the world, and who are no doubt often distinctly actuated by the high principle "*noblesse oblige*." Of course to all such ideas there is a large and growing body of opinion diametrically opposed.

But the acquisition by mere heredity, of legislative power, finds, in the England of to-day, only a small and diminishing number of supporters. The distinction recommended, by the Select Committee on the House of Lords in 1908 (§§ 8, 9), between the dignity of a Peer and that of a Lord of Parliament, was endorsed by a Resolution of the House in March 1910. The right to sit in the House, as depending *solely* upon descent, was abandoned in the Conservative Reconstitution Bill, which was read a second time in the same House without a division; and a popular instead of hereditary basis is, according to the preamble of the Parliament Act passed in 1911, intended in the Second Chamber which is to be substituted for the House of Lords. Of the permanency of that House in its present condition there can be very little expectation. On the necessity of *some* Reform, and also of retaining to the Second Chamber a due share of legislative power, a large proportion if not a majority of Englishmen are fully convinced.

Passing from qualifications to powers, we will begin with

the Parliament Act of 1911, by which the legislative powers of the House of Lords are now regulated. Under this Act, the provisions of which are given in their general result: 1. The Lords are deprived of any power to amend or reject a Money Bill passed by the Commons, its character as a Money Bill being determined by the Speaker of the latter. 2. Any other Bill (except as below) passed by the Commons and rejected by the Lords (or accepted with amendments to which the Commons will not agree) may become Law without the Lords' consent after a lapse of two years, and three specified acts of such passing and rejecting. But any Bill containing a provision to extend the maximum duration of Parliament beyond the time fixed in the Act (five years) is excepted from the operation of this section[70].

The first section is a statutory enactment of the alleged constitutional rule that Money Bills can only originate in the Commons, and must be accepted or rejected *en bloc* by the Lords. This allegation appears to have been, on the whole, accepted or tacitly received on the part of the latter. But the rule was distinctly a matter of *convention* (see below, p. 240), which had been actually criticised in point of principle or *rationale* by very good authority[71], and might certainly, though generally observed, be considered open to question on grounds of expediency.

The second section is a similar Statutory endorsement of the general "Constitutional Convention" which, though by

[70] The full text may be found in Hazell's Annual for 1912, pp. 367, 368.

[71] On the history of this rule see Anson[4], i. 268—271, where the extreme view of the Commons is well stated. For criticism of it, cf. Maitland, C. H. p. 310, and much recent literature, amongst others an able article by Mr E. G. Williams in the Fortnightly Review for April 1909. The rule, on the other hand, is accepted by Hearne, otherwise rather a stickler for the independent legislative position of the Lords (Government of England, p. 381) and has been widely adopted as to the Upper Houses of other modern States.

no means without its questioners, was regarded by Professor Dicey, and probably a majority of English writers on the subject, as firmly established, to the following effect: The House of Lords *must*, in the end, give way to the House of Commons; and (a most important corollary), if the existing House of Lords refuses to do so, the Crown *must* create enough new Peers to bring about the desired acquiescence—in popular parlance, to "swamp" the opposing majority in the present House. It was maintained, on the other hand, that the question whether a King *must* or *will* obey a Cabinet to the extent of a wholesale creation of Peers for the above purpose could by no means be considered as finally settled by the single actual precedent of Queen Anne's creation in 1712, and the reluctant pledge given by William 4 in 1832[72]. The present King, in the final crisis of the Act under consideration, felt, according to Mr Asquith, "that he had no alternative but to assent to the advice of the Cabinet," practically involving the creation of new Peers, "to secure that effect should be given to the decision of the country," as evinced by the majorities in the House of Commons. And the answer read by Lord Morley to a question in the Lords' House was this: "If the Bill (the Parliament Act) should be defeated to-night, his Majesty would assent to the creation of Peers sufficient in numbers to guard against any possible combination of the different parties in Opposition by which the Government Bill might

[72] See above, p. 179, n. 41, ll.cc. Also Dicey[7], pp. 426, 427, and *contra* Professor Stearn of Melbourne (Government of England[2], pp. 179, 183), who holds that such creation would be "unconstitutional," and moreover points out that even the permission extorted from the King in 1832 would probably, in the last instance, *not* have been carried out by Brougham and Grey, as appeared from Brougham's own words at a later time. See Greville's Memoirs, Geo. 4 and Will. 4, ii. 247, 284, &c. Also Lowell, Government of England, i. 417. The occasion for this special use of the Prerogative does not, of course, now arise.

again be exposed to defeat[73]." The Bill was carried in the House of Lords, by a majority, and received the Royal assent on August 18, 1911.

The Act above cited does not, except in the case of "Money Bills," deprive the Lords of an initiative or a power of amendment: but it certainly reduces their legislative power in all cases where there is a difference between the two Houses (except as to duration of Parliament) to the operation of a brake or drag. This operation of course has its value towards ensuring time for reconsideration of measures which may proceed from a temporary wave of feeling in the more popular assembly. But there is scarcely any other Upper or Second Chamber which has not enjoyed and does not enjoy more substantive power of co-ordinate legislation[74]. And, as in every case of importance (except the one mentioned in my notes, of Holland), a power of initiative is enjoyed by the Upper as well as by the Lower House; although more legislative proposals may in general proceed from the latter, the term Veto, as applied exclusively to rejection by the former, appears to me an incorrect, unfair and question begging expression. A similar remark applies to the term "Responsible Government," see above, p. 178, n. 40.

Other Second Chambers. I may add here a few notes on some leading points of interest to general jurisprudence in the case of Upper or Second Chambers in other modern countries. On this subject I must express my deep obligation to Professor A. S. Lowell's "Governments and

[73] The words are quoted for convenience from the same (Hazell's) Annual, cited above, p. 366.

[74] Mr Marriott (Second Chambers, pp. 229, 256) cites the Upper House of the Netherlands as the solitary exception. The Upper (here called the First) Chamber cannot originate a Bill and can only approve or reject. The power of rejection, however, applies to all Bills. See Statesman's Year Book, 1912, p. 1046.

Parties in Continental Europe" (1908) with the Collection of Constitutions printed in that work: above all, to the valuable conclusions of this very acute observer as to the practical working of the institutions in question. I have also made frequent and grateful use of the later works of Mr J. R. Marriott (Second Chambers), Mr H. W. Temperley (Senates and Upper Chambers), and of Mr A. B. Keith (Responsible Government in the Dominions). Among still more recent authorities are the Statesman's Year Book and Hazell's Annual for 1912.

I shall begin with instances of *Federations* which one of the last named writers (Mr H. Temperley) practically rules out, for purposes of comparison with other Upper Chambers, but the last of the three not so emphatically as the first two. I retain what has been written on them partly because the cases must necessarily occur to the mind of a reader, and partly because the distinctly Federal objects do not seem entirely to exhaust the functions of the Upper Houses.

The Federal Council of the German Empire (*Bundesrath*) is so unique in its character and powers that it is in truth scarcely to be named in the same category with an ordinary Second legislative Chamber. It has high Judicative functions, as a Supreme Court of Appeal, which are, unlike those of our House of Lords (above, p. 191), a present reality; it has its share in Legislation (with an important though limited power of initiative), as well as in the decision on various points of high Executive. This body has been in fact compared with the Roman Senate, as the "residuary legatee" of the Constitution. But its Federality is a radical distinction: it is essentially rather a Council of Diplomats delegated by the Confederate States than a Senate, and is, in fact, appointed by the Governments of the individual States for each Session. The *Reichstag*, on the other hand, represents

the people, being elected by universal suffrage and ballot, for a term of five years. Finally, besides the variety and importance of its powers, the German *Bundesrath*, is, like other constituents of Sovereignty in the German Empire, rendered more inapplicable for comparison with most other Upper Chambers by the exceptional position of the Emperor[75].

The Federal Assembly of Switzerland (*Bundesversammlung*) is composed of a National Council (*Nationalrath*), corresponding to an ordinary House of Representatives, which is elected directly by the people; and a Council of States (*Ständerath*), which is regarded as its nearest approach to an Upper or Second House. (The Referendum is, according to Mr Temperley, the true Upper Chamber of Switzerland.) The members of this *Ständerath* are elected, two from each of the 22 Cantons, but not on a uniform system, though the tendency with many is towards a direct popular vote. Neither is their tenure of office to any extent permanent, being dependent entirely on the individual Canton, and on an average, according to Lowell, of not more than three years. The legislative functions of this body do not appear to differ, either in principle or practice, from those of the National Council, with which it acts jointly on certain electoral and judicial occasions: but the free use of the Referendum and Popular Initiative (see below, pp. 270, 271) throws both into the shade. The Federal Council (*Bundesrath* or Conseil Fédéral) is a small body of seven members, unique in character, being

[75] See above, p. 184. As regards the Empire, an absolute majority in both Houses is required for legislation by Art. 5 of the Constitution. For the peculiar character of the *Bundesrath*, see Lowell, i. 259, 261, 269 and the third section of the Constitution, Artt. 6—10, id. ii. 358—360. Also Marriott, pp. 118—124 and Temperley, pp. 210, 211 (who considers it totally unsuitable for comparison with e.g. the House of Lords).

quite different from the assemblies hitherto described, and more comparable, in fact, to a Cabinet or President[76].

The members of the American Senate are formally, like those of the German Federal Council, representatives of the States, the maintenance of whose individual rights was, in the original conception of the Senate, their principal though not their sole function. This, although the doctrine of State Rights is strictly maintained, is no longer of the same predominant importance, and the body must now be regarded, in the main, as simply one branch of the Legislature, but possessing exceptional strength from the survivals of its original condition; endowed also with a considerable share in the executive power, and an exceptional and occasional one in the judicial. The last may, for our present purpose, be disregarded: as relates to the Executive, the Senate exercises an undoubted control over the action of the President (see above, p. 182), both in foreign relations and in nomination to office. On the merits and demerits of the former interference (which is somewhat narrowed, in its application as an example, by the peculiar geographical condition of the United States) Mr Bryce rather tends to an unfavourable judgement. With regard to the latter, the same tendency is more pronounced, at least as to recent practice. But in respect of legislation, the same observer puts this portion of the American sovereign body, although not quite at the ideal height to which it has been raised by some European writers, much higher than one would expect from his admissions as to its mode of appointment. The function of "restraining the impetuosity and fickleness of a popular House," claimed by Alexander Hamilton, seems to be on the whole well discharged: owing mainly to the longer term of

[76] See above, pp. 177, 180; generally Lowell, ii. 192, 208—210, and, particularly on the Council of States, Marriott, pp. 126, 128; Temperley, pp. 229, 211; and Statesman's Y. B. (1912), p. 1267.

office enjoyed by the members of the Senate, who are elected for six years. A Senator moreover must be 30 years of age. (A Representative is chosen every second year, and need not be more than 25.) The legislative powers of the two Houses are on an equality, except that Bills for raising revenue must *originate* in the House of Representatives. This adoption of our principle of Money Bills is however subject to the important exception that the Senate may propose or concur in amendments as on other Bills[77].

The members of the American Senate are, like those, in the main, of France (see p. 219), delegates of delegates, being chosen by "the legislatures" of the respective States. For the details of their election, as fixed by a Federal Statute of 1866, and for its actual working under the party meeting or "caucus" system I must refer to Mr Bryce's 10th chapter. To that system is obviously attributable a diminution in the individual independence and respect, enjoyed by members of the Senate, from the ideal of Hamilton or the supposed Roman models. For the caucus nomination, while it fully recognises ability and energy, is apt not to take any great account of character. Direct popular election might, in Bryce's opinion, work much better, and a decided movement in that direction is alleged by Professor Stimson (Popular Law-making, pp. 291, 292) to have taken place within the last few years.

Mr Temperley allows that the American Senate is actually the strongest Upper Chamber in the world, but rules it out for comparison with non-Federal ones, and only admits it into his work as adumbrated to some extent in the Senates of the State Governments. A mild form of deadlock between the two Houses occurs in both cases pretty frequently, but

[77] Art. 1, § 7. See Bryce[3], i. chs. 11, 12. For an opinion perhaps more favourable than that of Mr Bryce, see Marriott, pp. 107—112.

appears to be adjusted without difficulty by joint committees, or meetings of committees, and other methods.

There seems, in fact, to be a certain unreality, or mere pettishness, about such collisions; arising from the fact that they are not embittered by any class distinction, and that the Chambers, for all their differences, are based upon an identical electoral franchise. It is only in respect of the methods by which these collisions are settled that I propose to take them, if at all, into account[78].

I have now to consider cases of Upper Chambers into which the *nominative* principle enters.

The *Herrenhäuser* of Prussia and Austria in some points nearly resemble our House of Lords. With both the tenure of a seat is, in the majority of cases, for life. In Prussia, the qualifications are various and complicated; those of an independent character mainly representing nobility, land ownership, intellectual eminence, ecclesiastical or otherwise, and the chief magistracies of large towns. By the side of these, however, are Royal nominees consisting partly of persons of general distinction but also of others appointable on any ground of special trust (*aus besonderem Vertrauen*) in an unlimited number and, though usually, not necessarily for life. This right of the Crown is recognised, but not always approved, by German authorities, as peculiar to Prussia, and clearly directed to the securing, or destroying, a government majority by the creation of a batch of Peers (*Pairschub*).

As has been well pointed out by Mr Temperley, the swamping power is here not only a reality in practice, but, as distinguished from the case of England, is exercised by the personal Sovereign, not by a Minister responsible to a House of Parliament.

On the indirect election of the Lower House or Chamber

[78] See Temperley, pp. 32, 33; Bryce[3], i. 188, 189.

of Deputies (*Abgeordnetenhaus*) in Prussia see below (p. 291, n. 195). The budget and all Money Bills must be presented first to this Lower House and accepted or rejected as a whole by the Upper: in other respects the powers of the two Houses are identical. Here again, as in the Upper House, the King's power of appointing and dismissing Ministers *proprio motu*, give him, though in a different way, a virtual control. Both Houses together, i.e. the Diet as a whole, must be regarded as practically subordinate to the Executive[79].

In the Austrian Constitution, both the resemblances to our own and the differences from it, are much more suggestive, than in the Prussian, to the English reformer or jurist. The legislative powers of the House of Lords and the House of Representatives are equal, except that the Budget and the Bill fixing the number of recruits must be presented to the latter first. The part of the *Herrenhaus* sitting independently is not materially unlike that in the case of Prussia: it represents nobility, landed property and ecclesiastical distinction. But in the important point of the nominated members a great change has been made by recent legislation. The Emperor's power of appointment for life—nominally for distinction or signal public service—was, till 1907, unlimited. It had, in fact, been so freely employed, in order to ensure the passage of ministerial measures, that the body resembled rather a Governmental Chamber than an Assembly of Nobles. But, on the introduction of universal and direct suffrage for the Lower House in the above year (1907), this power of appointment to the Upper was limited to the effect that the number must be 150 but cannot be more than 170. The exact ultimate effect of this change is not perfectly clear.

[79] On the Ordinance (of 12 Oct. 1854) regulating the constitution of the *Herrenhaus*, see Holzendorff, Encycl. (1904), i. 581 and Dareste, Constt. Modernes, i. 191, n. 4. On the Prussian Constitution generally, Lowell, i. 301—303; Marriott, pp. 124—126; Temperley, pp. 231—235; Year Book (1912), pp. 910, 911.

These life Peers are stated to have been, in 1908, 165, in 1911, 159 (Year Books of 1912, 1913). It is evidently still possible that 20 might be created at a time: but it has been assumed that the "swamping" of a majority in the Upper House by the creation of new Peers is no longer possible. The result would seem to be a greater permanence and strength in the Upper House as against the newly democratic supremacy in the Lower. The general expedient for preventing a deadlock between the two is the appointment of a joint committee: but there are some details as to Money Bills and the representation, in the *Abgeordnetenhaus*, of racial minorities, which will be considered, if necessary, hereafter[80].

In Italy the legislative powers of the Senate are legally the same as those of the Chamber of Deputies, a body elected on a moderate educational or low occupational franchise: except that Money Bills must be presented first to the Lower House. In practice, however, on any important difference, the Upper House now always gives way. This is the result, though not apparently the original object, of an unlimited power of Royal nomination. With the exception of a few Royal Princes, the Senate consists of persons 40 years of age appointed for life out of definite categories of qualification ranging from high office, ecclesiastical or civil, service in the Chamber of Deputies and honour done to their country by other service or desert, down to the yearly payment of 3000 lire (£120) in taxes[81]. Mr Temperley has some valuable and appreciative remarks on this as an ideal of a *nominated* Chamber of life Peers, qualified by an assertion of the *corruptio optimi* which he considers must necessarily take

[80] See Lowell, ii. 85; Marriott, pp. 221, 222; Temperley, pp. 236—239; Year Book (1912), p. 607.

[81] Lowell, i. 155. See Statuto, Artt. 33—38, id. ii. 349, 350 and Year Book (1912), p. 959.

place, in practice, through the inevitable utilisation of any principle of free appointment, by successive Prime Ministers, for "swamping" purposes[82]. Such utilisation might, it would seem, be prevented by some limitation of the nominating power, and confinement of a nominated *element* to a definite proportion of the whole (see below, p. 225). But I pass to the case, at present in most favour, of an *elected* Senate.

In **France** the members of the Senate are distributed among the Departments in proportion to population. The quota for each Department is elected by an Electoral College consisting of persons who have either been themselves elected to other office, or are delegated for this express purpose by the Municipal Councils. The last named bodies, which return the great majority of Electors to the Senate, are themselves elected by universal suffrage. It is therefore true that the Electorate to the Senate is likely to be democratic, but not without considerable influence, on its selection, resulting from the experience and responsibility of office, however small a one.

Personally the 300 present members consist, partly of the remainder of 75 life members elected in 1875 (and then 40 years of age) but, as to the main part, of citizens elected, at 40 years of age, for nine years. The details of election and of renewal of the Senate need not be entered on here.

In ordinary legislative power the French Senate is on an equality with the Lower House, the Chamber of Deputies, subject to the usual exception that financial Bills must originate in the latter: but these Bills may be rejected and, it is alleged by some, may be amended by the Senate. The fact, again, that the conformity of the latter is required to the President's power of dissolving the Chamber of Deputies, though, to speak strictly, a matter of Executive, should be

[82] Temperley, pp. 92—95.

mentioned here, since it must naturally be considered as rendering the power of a Ministry very different from what it is in England and other cases of "Responsible" government (see above, p. 158). The more general view is that a French Ministry is responsible to the popular Chamber only, but a responsibility to both has been maintained, notably by M. Yves Guyot on the strength both of Law and Convention. It would certainly seem that the political weight of the French Senate is greater than as it was described, in somewhat depreciatory terms, by Lowell and also by an earlier, but possibly closer, observer—Bodley. A considerable influence is attributed to the Senate by Mr Temperley, as derived from its *democratic* character. The only provision against deadlock is in the expedient of Joint Committees[83].

The last instances of an Upper House which I propose to quote are some existing in our own Dominions, which have been partially treated above (pp. 156—160) in respect of the relation of the particular Dominion to the Imperial Government. The internal economy of these Dominions, particularly the relative position of the Houses within a Dominion, remains for our consideration.

Whether for the sake of analogy to the British Constitution, or from other motives, the Bicameral system has been adopted in all our Dominions and in most of their subordinate parts or members[84]. In Australia, under a Constitution which was most carefully considered and matured by the People themselves as well as by their delegates and Premiers[85],

[83] See generally the Constitutional Laws of 1875 and 1884, &c., all given in Lowell's Appendix, ii. 337—345; also his text, i. 19—26: Bodley's France (1899), Book iii. ch. 1, § 6; Marriott, pp. 214, 215; Temperley, pp. 95, 98, 104, 307, n. 19, and pp. 284, 285.

[84] See Mr Temperley's sketch of this adoption of the Bicameral system, which certainly does not err on the side of too favourable an appreciation of Colonial preference for it, pp. 39—48.

[85] See Marriott, pp. 165—167.

the Parliament consists of the King, as represented by the Governor General (see p. 157), a Senate and House of Representatives. The Senators, six to each State, are directly chosen by the People as an Electorate, on the basis now of universal adult suffrage for all natural born or naturalised subjects. The qualifications in Senator and Electors are, barring sex, the same, and the same as those for the Representative and *his* Electors, but the Senator is appointed for six years, whereas the House of Representatives does not continue at the outside for more than three[86]. Money Bills are to originate in the House of Representatives, and the Senate may not amend any "proposed law" imposing taxation, or any other proposed law so as to increase any proposed charge or burden on the people, though they may *return* such a Bill *requesting* omission or amendment, which the House of Representatives is free to accept or not. Otherwise, the Senate is to have equal power of legislation with the other House subject to a special provision for the case of a proposed law passed by the House of Representatives and rejected by the Senate. This is a simultaneous dissolution of both houses competent to the Governor General (within certain limits) and an ultimate joint session of the New Houses in which a determined and substantial majority of the lower must prevail[87]. On the occasions for and the adoption of a Referendum see below, p. 242.

The South African Union is still in a somewhat transitory position, as the Senate, in which we are principally interested, may be reformed by Parliament after 10 years from 1909.

[86] Constitution of 1900 (63 and 64 Vic. c. 12), §§ 7, 8, 16, 28: add, as to Female Voters, No. 8 of 1902: see pp. 3—7 and 290, Commonwealth Acts, Vol. i.

[87] ib. §§ 53, 57. Mr Temperley treats of this subject very fully (pp. 214—218), regarding the procedure in question as a means of obviating the possible danger of a Senate bribed by "the capitalists and plutocrats." Neither the danger nor the remedy seem yet to have occurred.

As regards the relation of this Dominion and its component parts, it is, as compared with Australia, distinctly Unitary rather than Federal. Whereas in the latter case the component states have very extensive internal powers, the doctrine of State Rights being as strictly preserved as in America, in the South African Union the States are chiefly concerned with minor local and municipal matters[88]. Our business, however, is mainly with the Senate of the Union. Until its subsequent constitution by the Parliament, eight of the Senators are to be nominated by the Governor General acting with the advice of his Executive Council, i.e. the Federal Ministry, as it is generally interpreted[89], while the remaining 32, eight for each province, are, as at present contemplated, to be elected, not directly by the Electors to the (popular) House of Assembly but by their Representatives in that House, together with the members of the Provincial Councils who are also chosen by the same body of Electors.

The tenure of office is 10 years and the Senator must be 30 years of age. The other qualifications are much the same as in Australia, with the additional requisition, however, of a certain ownership of "immoveable property" in the Union[90].

The powers of the Senate with regard to Money Bills appear to lack even the limited precative action allowed under the Australian Constitution[91]. On disagreement between the Houses, the procedure is much the same as in

[88] See Temperley, pp. 212, 228 and the South African Act (1909) of Edw. 7, e.g. § 85.

[89] The same Act, §§ 12, 13, 24, i; Temperley, p. 228. See however, Keith, pp. 147—152.

[90] ib. §§ 25, 26. As to the qualification, considerably discussed and possibly temporary, that the Senator must be "a British Subject of European descent," see Marriott, pp. 188, 189.

[91] ib. §§ 60—62, and Keith, Pt. iii. ch. 8 particularly p. 641. Compare § 53 of the Australian Act. In both cases the *express* provisions as to amendment appear implicitly to leave the power of rejection *in toto* unquestioned. But see Keith, pp. 555—565, as to the assumed

Australia (see above, p. 221) but omitting the dissolution and re-election of the Houses (see § 63 of the South African Act). On a joint sitting, a majority might be similarly ensured by the greater numbers of the Lower House.

In Canada the members of the Senate are nominated for life by the Governor General—in practice by, or with the approval of, the party majority in the Lower Chamber. Each Senator must be 30 years of age and possessed of 4000 dollars' worth of property within the Province for which he is nominated: he must also be resident in the same Province, and a natural born subject or naturalised. The Senators are assigned to the Provinces in proportion to numbers of population and importance, by the British North American Act (of Union), 1867, and subsequent amendments. (In this point of proportional assignment there is a notable difference from the American Confederation.) There are at the present time 87 Senators, as against 221 of the House of Commons. The latter is elected for five years by the people, in numbers proportionate to population at the last census, with a low but somewhat varied franchise, which is under the control of the several Provincial Assemblies. These have power to regulate their own local affairs, but cannot interfere with the action and policy of the Central Government.

The Houses have generally equal legislative powers, except that Money Bills must originate in the Lower. In practice, the Upper House does both amend and reject them, but must apparently, in the end, bow to the Lower. A provision for deadlock between the two is hinted at rather than distinctly made in the Act referred to; a very limited power of adding members to the Senate being contained in §§ 26 and 27. On the whole, the Senate of

difference between an elective and a nominee Upper House as to Money Bills, and the resemblance of the latter, in this respect, to the House of Lords.

Canada is regarded as practically powerless by observers of widely different schools of thought[92].

Any generalisation on modern political bodies or legislative assemblies abroad must be mainly tentative: partly from the inadequacy of written documents to express actual practice, except in cases specially observed; partly from the probability that observation itself is much coloured by the individual predilections of the observer; and partly from the fact that new cleavages appear to be taking the place of the old lines of division. It is possible, for instance, that so broadcast a substitution and replacement as is involved in the Cabinet system (see pp. 158, 178) may not always be regarded as essential to a reasonable solidarity of government. The permanence, on the other hand, of Bicamerality, as an institution, has been contested, and, in a few instances, a Single Chamber system adopted, though not very persistently or successfully. Bicamerality has been here assumed as likely to continue; and we have proceeded accordingly to consider the qualifications and functions, in particular, of an Upper Chamber. The latter have been very seldom regarded, it seems to me, as purely suspensory or advisory, though bare power of suspension is not to be despised or rashly abandoned, by the side of a democratic assembly, even if the latter be, in the end, to prevail. Some points, again, appear to be rather suggestions from English practice and history than matter of a general natural developement, which would of course make more for permanent retention. It may, therefore, for instance, be doubtful whether the English rule as to Money Bills, which has already been abandoned in part by several countries, will always retain its present following: at least where the principle of *hereditary membership*, such as

[92] See, on the whole subject, Marriott, pp. 131—151; Temperley, pp. 223—226; Year Book (1912), pp. 245, 246. A very recent action of the Senate however (1913) rather contradicts the above view.

ours in the House of Lords, has ceased to exist. That this principle must be given up (except perhaps in the comparatively unimportant case of Royal Princes), appears to be a necessary condition for the retention in power and utility of any Second Chamber. But it does not follow that the advantages, for public service, of an aristocratic element (see pp. 208, 289) should be thrown away.

The principle of Nomination or personal appointment, whether by King, Governor or Prime Minister, would seem, in itself, to possess a considerable degree of responsibility and amenability to public opinion. It might therefore naturally be expected to subsist to a limited amount. Indeed, the condemnation of this principle depends mainly upon its misuse for party purposes; such as the "swamping," which goes far to render the very existence of a Second Chamber nugatory.

On the other hand, the practice of Election to the Second Chamber, which appears rather to be coming into favour, and is in our own hereditary Peerage partially practised, in the case of Irish and Scotch members of the House of Lords, has a great deal to be said for it, with some specialisation of the eligent and eligend, or of both. Election, simple, unqualified and by the same voters as return the members of the popular assembly, seems to me the mere simulation of a check upon whatever may be the faults of that assembly which is really no check at all.

Election from a body specified by honourable descent was referred to above, principally as a means of continuity with an ancient aristocratic element like our House of Lords[93]. Election on the other hand, from persons generally possessed of a certain amount of property, which has been, but rarely, recognised as qualification for a Senator, belongs

[93] See above, p. 208, and the Report referred to, especially Lord Courtney's Memorandum B.

rather to a new cleavage of parties or interests, which will be more particularly treated hereafter (p. 286).

An appointment of Senatorial Electors for the express purpose of that election, has very contradictory evidence, as to its merits, in France, though based equally on results (above, p. 220). The somewhat unfavourable judgement of Bryce, is not quite on the same case, in America (see p. 215); and is, moreover, rather provoked by a vicious developement of party organisation than by the principle, in the abstract, of delegation by delegates. In itself, an election, or partial election, by a Lower House, would undoubtedly bring to bear the judgement derived from experience, and tend towards harmony between the two Houses (see below, p. 289).

Finally, however the conditions of membership, in a Second Chamber, are determined, general opinion is evidently in favour, if not of life peers, at any rate of a substantially longer tenure of office, as well as of more mature age, in the case of the Senator than in that of the ordinary Representative directly returned by popular election. I pass however, now, to the subject, more important as it is generally considered, of

The Popular Assembly. The usual conception of this Assembly, which has at different times obtained a share, greater or less, of legislative power, is primarily that of the People at large, or rather the male members of the People, without distinction of quality except so far as they are disqualified by minority, tutelage or unfree condition[94]. The members of such a body are always *in esse* and only require general summons. They cannot, of course, be in continuous session, as the smaller legislative body or chamber might be, and as the executive or administrative body practically must be, in some at least of its members. What we have now to consider is the actual working of the sovereignty or

[94] See Freeman, Norman Conquest[2], i. 103 and App. Q. Also above, pp. 202, 203.

part-sovereignty which is exercised by the popular branch of the legislative assembly, as developed mainly in modern times, when slavery is largely discontinued, and woman partially recognised as a political agent.

The above primary conception of the popular assembly, as consisting of the citizens or male freemen personally present, has been capable of practical realisation in a comparatively small city-State or in a migrant host. The latter, however, we have agreed to disregard (p. 162).

The Ecclesia of Athenian citizens, who constituted a very large number, though by no means a majority, of the Athenian population, did apparently take part in administrative and judicial functions, as well as in legislation, to an extent almost incredible in our eyes. But this participation does not extend over a very long period, and the individual leisure required for it was in fact only secured by the existence of a large amount of slave labour.

In Rome direct legislative power, together with the function of trying more serious public offences and from time to time deciding on individual questions of public policy, was possessed, during the greater part of the Republic, by the body of citizens at large (above, pp. 175, 185), although towards the last century of that period, particularly after the franchise was extended through Italy, the more far-resident citizens must have been practically disfranchised by their distance from the city. How far and by what means discussion and amendment came to be carried on, before the ultimate submission of a legislative proposal to acceptance or rejection, are matters of too much detail and difficulty to be treated here.

The original popular assembly of freemen may still subsist in certain small Swiss communities, as an electoral and legislative body on minor affairs. But in other cases it has died away, being replaced by the representative assembly

which is one of the leading features of most modern Sovereignty[95]. On the growth of that assembly in England a few notes follow here.

Among our own Teutonic ancestors, as among other northern nations, there are numerous indications of early assemblies based, it would seem, upon an old military organisation. But the action of such assemblies, with regard to whatever was put before them, whether nominally legislative or not, does not seem to have amounted to more than what I take to have been the vague popular assent given to the so-called *lex curiata* of Rome (see below, § 5, p. 308).

To confine ourselves, however, to Anglo-Saxon record— After the researches of Liebermann and others, the same weight cannot be given to the prologues and other statements on the circumstances of legislation by our pre-Norman or early Norman Kings, which was formerly given in the days of Kemble, or even of Freeman and Stubbs. Yet we may surely take these statements, at the lowest, as indications of traditional belief not very much later than the events to which they refer. The conclusions at which we may arrive from the instances collected in the sixth chapter of Stubbs' Constitutional History and the sixth chapter of Kemble's second Book scarcely amount to the recognition of "a power of self-government in the whole people," or more than a very occasional assent to new law[96]. The co-operation, on the other hand, of the Wisemen or Counsellors (*Witan*) with the King, particularly in the making of laws, is definitely and distinctly expressed[97]. How far this co-operation could be

[95] See Austin[5], 6. 244; St. 96; Crane and Moses, Comparative Constitutional Law, ch. 13, pp. 173, 174, &c.; Freeman's Growth of the English Constitution, chs. 1 and 2; Bluntschli, Book vi. particularly 11. 352; 12. 363; and 22. 440, &c.

[96] See Stubbs, ii.[4] 258; on the other hand, Kemble (Saxons in England), ii. 201, 238, 240: Freeman (Growth of the English Constitution), pp. 54, 60.

[97] Kemble, ii. 205—213; Stubbs, i.[6] 141—143.

considered active participation; how far it may in general have been little more than attestation[98], is a matter of particular constitutional history into which I cannot enter here.

The point at present in question is not the power or privilege of the Witan or similar bodies, but the relation of such bodies to the rest of the free community. The independent right which may once have been possessed by each member of such community, in our own and cognate cases, to take some direct part in the common legislation, appears to have been first modified in general, not by the principle of *election* but by that of *selection*, or summons on the part of some Headman. The Witan, for instance, may justly be considered the predecessor of the House of Lords: like the House of Lords it may, as above suggested (p. 207), be looked upon as virtually in a sense representative, but it was certainly not so in the stricter meaning now usually attached to the word—the meaning in which Representation is now spoken of as the practice of most civilised nations[99].

Representation. No definite system of Parliamentary Representation in England can be said to have existed before the reign of Henry 3. It is, in fact, more generally dated from the great "model" Parliament, as it has been called, of Edward 1, in 1295, when the Knights of the Shire, the Citizens of the City, and the Burgesses of the Borough, were first elected with full procurational power both to advise and execute[100]. Representation, in a general sense, of the various Communitates or organised bodies of

[98] See Maitland, Domesday Book and Beyond, pp. 250—252, on this question with regard to Royal Charters.

[99] Stubbs, i.[6] 135.

[100] ib. ii.[4] 265. See Maitland, Const. Hist. p. 72. The recently discovered documents of 1275 do not seem to prove election, so much as *selection* by the Sheriff, and appointment, *as agent*, by those selected. See Hist. Review, xxv. 235, 239, &c.

freemen—County, Borough, or Township[101] for fiscal and judicial purposes, there evidently was already: but the choice of the individuals by the larger body of those whom we now call Constituents is by no means generally proveable for the ancient *reeve, tithing-man, borsholder*, &c., although it is so in the case of most of the provisions made by *charters*, and in *writs* issued for the return of various representative persons, which date from early in the 13th century[102].

The moment we pass from the old popular assembly of freemen to the modern one, of what has been called "representative Democracy," we come to important questions as to the *duration* and *scope* of the representative function. Our own early Parliaments were clearly summoned *ad hoc*, for special purposes. Prorogation, which means the retention of the same Representatives, was not frequent. Each session, as a rule, required a new election of members, and the intervals between the sessions, in spite of the Statutes for annual Parliaments passed in the reign of Edward 3, were in practice very variable, occasionally lasting many years[103].

Fixed periods for the normal duration of a Parliament, have now been long established both in England and in the other countries possessing legislative assemblies, periods sometimes of three but usually of more years[104]. On the one hand therefore it is clear that, during such considerable periods, matters of more general character must occur for

[101] On the various meanings of Commons, see Stubbs, ii.[4] 175, 176; on application of the term Communitates to the different bodies mentioned above, Pollock and Maitland, i. 478, 520, 550, 625.

[102] Stubbs, ii.[4] 237—239. See, for the earlier state of things, Maitland, Domesday Book and Beyond, pp. 149, 209: Pollock and Maitland, i. 600, 641. The word *reeve* (*gerefa*) itself, if its original meaning be really *exactor*, seems rather in favour of an *external* appointment.

[103] See Stubbs, ii.[4] ch. 17, pp. 642—646; also Maitland, C. H. pp. 177, 178.

[104] I must refer to any English Constitutional History for detail as to the Triennial Acts of 1664 and 1694, and Septennial Act 1715: for a brief but excellent sketch, see Maitland, C. H. pp. 292—297. I omit the subject of dissolution whether by, or on demise of, the Crown.

consideration besides any special objects contemplated at the time of election of Representatives. On the other hand it follows from the principle of election generally that there must be times, not merely between session and session when the Representatives are *in esse* though not assembled, but between the expiring of one Parliament and the election of another when there are no Representatives. A minor question has been raised as to who, during these intermediate times, are the interim owners or part owners of Sovereignty: and a more important one whether, as between Constituents and Representatives generally, the Sovereignty, or particular portion of Sovereignty, resides in the former or in the latter.

Question of Sovereignty. As to the first question, Austin considers that, in the intermediate periods above referred to, the Sovereignty exercised by a representative body *reverts* to its original possessors the Constituencies or Electors; so that, in the English Constitution, for instance, the King and the Peers, with the delegating body of the Commons, are then the body wherein Sovereignty resides. Professor Salmond holds that, in this case, the supreme legislative power is *non-existent*, while the supreme executive power is retained unimpaired by the Crown[105].

This view of the condition of the Executive may be admitted as a matter of Constitutional theory. As a matter of fact, all ordinary executive business will be carried on exactly as usual (see above, p. 178, and n. 40), while any extraordinary interventions by the Royal Executive will be as far as possible avoided. No one, of course, would now maintain any shifting of the Sovereignty, as a whole, to the theoretically constitutional Head of the Executive: and, if we identify Sovereignty, on the whole, with the Legislative, it would seem more correct to say that, in these intermediate periods, the Sovereignty is *dormant* or in *abeyance*, unless

[105] Austin[5], 6. 245; Salmond, App. ii. p. 476.

we have recourse to the new theory, rather different from Austin's, of a *political* standing Sovereignty, the *organisation* of which into a *legal* one is the only thing in abeyance[106].

To pass however to the broader question which arises on the state of things *during session*, or during the existence of a Parliament generally, as to its elected portion:—In the election of Representatives to a legislative assembly, there might of course be a limitation of legislative power by the express reservation of such power on certain fundamental subjects, whether to the members of the Constituencies or to free citizens at large organised in some other manner. Such checks exist, but are rather checks upon the Legislative as a whole than upon the Representative body in particular —amounting in fact to the creation of an *extraordinary* legislature behind and practically above that in current operation (see below, p. 247).

Where, as in the English Parliament, there is no such express limitation, the relation between constituents and Representatives is stated by Austin, for that particular case, in a very contradictory, or at least undecided, manner[107]. The Sovereignty, or portion of Sovereignty, exercised by any particular representative body he considers, as we have seen, really to reside in the Electors or Constituencies and only to be temporarily delegated to the Representatives. It *may* be so delegated absolutely and unconditionally, as it is agreed by Austin, in accordance with most writers on the British Constitution, to be in law delegated to the members of our House of Commons. The latter therefore are completely invested, during the period for which they are elected, with the Sovereign character of their Constituents. They might lengthen their tenure of office: they might concur in annihilating or eventually altering the actual constitution of the

[106] See Brown, p. 128, note, and below, p. 265.
[107] Austin[5], 6. 245—247; St. 96, 97.

supreme government of which they form part. "Speaking accurately," however, Austin goes on to say, the members of our House of Commons are *trustees* for the body by whom they are appointed; bound, under their trust, either to endeavour after certain specified ends (the theory occasionally maintained, in recent times, of "mandate"), or, generally, at least to abstain from any such exercise of their power as "would tend to defeat the purposes for which they were elected and appointed." The obligation, in the case in question, belongs from its *tacit* character, he holds, rather to the latter, the vague and general class. In either case, however, it can only be enforced by *moral* not by *legal* sanctions; a conclusion of which Austin gives one of his favourite Euclidean proofs, deduced more or less satisfactorily from his own definitions and postulates as to Law[108]. Ultimately he admits that the "trust" resolves itself into a "fear of offending the bulk of the community" by breach of the supposed engagement with the electoral body. So far as this security for the trust is confined to the relation between Representative and Constituency, it will be considered directly. But the wider and vaguer sanction, which Austin's words will cover, is neither more nor less than that of Constitutional Law (or, to speak strictly, of Constitutional Convention) in general, which will be treated in a later part of this section (pp. 255, 256).

In a passage, which Austin evidently had in his mind, Blackstone, at the same time that he descants upon the unlimited legislative authority of the British Parliament, speaks in a general way of "this important trust." No *legal* existence of any such trust, still less of any legislative authority, in the Electorate, is recognised by British Courts: and Professor Dicey points out that such ideas are absolutely

[108] Rather *less* so, to my mind: but the whole argument seems absolutely immaterial. The passage is in Austin[5], 6. 247.

inconsistent with the remarkable self prolongation, to seven years, of a Parliament statutorily elected for three, by the Septennial Act of 1716, which he regards as a standing proof of English Parliamentary Sovereignty[109].

The view as yet generally held by English authorities, and also by writers on Constitutional Law elsewhere[110], is that where an electoral body delegates its powers, or to speak more by the book, elects its Representatives, to take part in legislation, generally and unconditionally, as is the regular practice, the Representatives are Sovereign, or part of the Sovereign, not the Electors. We hear very confident statements of "mandate" to a particular Parliament to carry this or that measure, which it is of course possible for their backers to define in express terms. We see continual attempts to turn the individual Representative into a mere delegate or agent. But the principle which still obtains, at least in England, is the same as was well expressed by Burke, that the elected members of Parliament are solely bound to act according to their own opinion for the interest of the entire community[111]. Personal feelings of honour may dictate resignation on some very definite change of front, though it is remarkable how very differently this sentiment has operated, and even upon the same individual on different occasions. The only general practical sanction of any definite practical trust understood to be reposed in Representatives by their constituents is the risk of not being re-elected.

[109] See Blackstone, i. 161; Dicey[7], pp. 42, 44 and generally on the subject pp. 57, 72. To the particular instance cited by Dicey I shall have to return under the more general subject of the omnipotence of Parliament (below, pp. 245, 246).

[110] See e.g. Crane and Moses, ll. pp. 147, 148; Laband, Staatsrecht des D. Reiches, i.[4] § 32, pp. 270—274; Brisaud, Droit Français public et privé, i. 978. Contrast the "*Mandats*" of the individual Representatives under the Monarchy, ib. p. 800.

[111] Lowell, Government of England, i. 496, and Burke's speech to which he refers, Burke's Works, iii. pp. 18, 19.

Under the prevalent system of return by a majority of electors in an individual district, this risk, though of course not reducible to a certainty, may often be approximately calculable through local party organisations. The individual member, therefore, of our own House of Commons for instance, if he ventures to exercise a decided independence of opinion in the face of his constituents, knows that he is taking his future political life in his hands, which, if he is a poor man, and particularly if he is a paid member, will operate as a powerful deterrent, except in cases of unusually strong character and generally known ability.

The organisations here referred to have been hitherto, in the cases most familiar to ourselves, connected with a dual party system. In England we try to divide ourselves into Conservatives and Liberals; but most independent thinkers find it difficult to take the one or the other title, even with the convenient prefix of "truly." It certainly becomes harder every day to shew that the measures for the time adopted by the one or the other party leader are distinctively matter of Order *versus* Change, or (to use the other language) of Obstruction *versus* Reform. The difficulty is greater still when we attempt to sort the proposals of the American Republicans and Democrats by a cleavage of opposing principles. The natural consequence has been that, even in these two cases, and more so in Continental Countries, the convenient dual division above referred to tends to resolve itself into temporary coalitions or groupings of really distinct unities of feeling or interest[112]. But amongst such unities

[112] The difficulty here referred to—that is, the difficulty of reducing a varied and extensive programme under the simple head of Conservative or Liberal—seems to me to account best for what Professor Lowell calls the failure of the Caucus system in England; though his account apparently attributes greater weight to personal difficulties. See his Government of England, i. chs. 29 and 30 on the National Liberal Federation and the Conservative National Union. The attempt, by combining and centralising

there is one—that of Labour—which is now apparently tending to predominate over all others, which especially claims to dictate the action of its Parliamentary Representatives, and which is obviously and avowedly in a position to enforce that dictation (see below, p. 284).

In considering, however, this metamorphosis *pro tanto* of the Representative into the Delegate, I shall be straying somewhat into the domain of politics, and suggesting questions of future expediency, instead of confining myself, as I have hitherto for the most part endeavoured to do, to matter of past or present fact. The same remark applies to the discussion of a theory of "political Sovereignty," behind the ordinary or "legal" one, and to the subject, closely connected with this theory, of "direct legislation by the people." In fact, the popular representation hitherto considered has considerable bearing not only on such rather academic questions as where the Sovereignty or part Sovereignty resides, but on several practical problems of modern legislation. All this matter will therefore be taken together at the end of the present section, preceded, however, by a consideration of the Austinian view of Constitutional Law, and the modifications of that view which appear to be desirable.

Austin's view of Constitutional Law. The main treatment of *individual* Rights and Wrongs, as distinguished from Right and Wrong in general, is in my view, best taken under the Division of Law by Subjects, to which I have been obliged to relegate most of Austin's Analysis of Pervading Notions (see § 1, pp. 30, 34). But I may here borrow one or two startling, if not paradoxical, allegations made by him as to certain individual Rights or Wrongs, by way of

local agencies, to go further and create a national authority, outside Parliament, able directly to control the measures to which priority shall be given, in Parliament itself, has happily not yet been a success.

introducing the subject which occupies a considerable remaining part of this section.

Take, for instance, the position that a Sovereign cannot, as Sovereign, have *legal* rights against, or duties to, its own Subjects[113]. This depends, of course, upon the view that all Law is the creature of the Sovereign. It is, logically, a truism or, at any rate, an immediate and obvious consequence of Austin's definition of Law and Sovereignty.

Professor Holland, applying the same principle more generally, shews that no act whatever of the sovereign power can be *illegal*; while it is only in a lax sense that acts can be called *unconstitutional* which run counter to the expectations and political usages of the inhabitants of a country[114].

A special application of Austin's definition may be particularly noted here—that there is no *legal* obligation, on a Sovereign, to observe even a *law* which that Sovereign's self has made, for its own guidance. Acts conflicting with such laws stand on the same footing as acts conflicting with any other principles usually observed by the Sovereign as approved by the bulk of the community, or the bulk of its influential members. They are in a general sense *unconstitutional*: they are so in a special sense, if the principles are those which fix the constitution or structure of the given supreme government. But *illegal* they are not and cannot be[115].

In the case, however, to be at present considered, we are not so much concerned with *occasional* acts, of an executive or quasi-executive character, like the dispensing or suspending power referred to above (pp. 174, 175), as with

[113] Austin[5], 6. 281, 288, &c.; St. 115, 120.

[114] Holland[10], pp. 359, 360. See for a discussion and to some extent a justification of Austin's position, Brown, pp. 192—194, note.

[115] Austin[5], 6. 264, 268; St. 105, 108.

permanent prospective contraventions, by a Legislative, of constitutional rules previously existing. Self imposed limitations are practically an instance of such rules, and will deserve special notice, but the ultimate object of the whole of the present enquiry is this:—With regard to the regular or as it is sometimes called, *legal* Sovereignty, which we have, on the whole, identified with the Legislative, what are, if any, its actual limitations, or its general conditions of efficient existence, in ordinary times? In other words, what is the true nature and sanction of the various rules—in some cases perfectly settled and acknowledged, though, no doubt, in others, matter of flux and controversy—which are loosely associated together under the common name of Constitutional Law?

Reference has been made above (§ 2, p. 86) to a certain detrimental result arising, in the opinion of the present writer, from a denial of the title of Law to the rules actually obtaining as between civilised nations in general. So too, in the matter at present before us, besides the very unreal character of the above positions, deduced logically from Austin's definitions, there is surely something inimical to order or security in weakening, even by terminology, the rules (whether we can call them strictly law, or custom and convention) which regulate the constitution and functions of the ultimate legislative body in a State. Indeed Austin's own practical good sense, on occasion, so far overrides his theory as to allow parts of Constitutional Law "so-called," though nothing but "ethical maxims," to be inserted in the Corpus Juris "for reasons of convenience which are paramount to logical symmetry[116]."

Constitutions written and unwritten, rigid and flexible. Besides what hamper may be due to Austin's definition, the English student is perhaps liable to start with

[116] Compare Austin[5], 6. 266 with 44. 745, 746; St. 107, 367.

a somewhat limited view of the present subject, from the peculiar condition of our own Constitution, and the absolute legislative authority of our own Parliament, which appears indeed to have formed the main basis or model for Austin's conception of Sovereignty in general[117]. It may therefore be useful to begin by pointing out the exact differences intended by calling Constitutions and constitutional rules *written* or *unwritten*, *rigid* or *flexible*, taking our own English Constitution as the first instance.

This Constitution, then, is to begin with, *unwritten*, i.e. is not, as a whole system, included in any legislative enactment[118]. Part, no doubt, is statutory, but part is embedded in various judicial decisions, and many most important principles in operation at the present day, such as Cabinet Government and some of the relations of the two Houses of Parliament were until recently matter of pure modern custom. By the side of such documents as Magna Carta, the Petition of Right, the Bill of Rights, &c., there is "a whole Code of political maxims universally acknowledged and carried out which has grown up without leaving among the formal Acts of our Legislature any trace of the steps by which it grew[119]."

On the other hand, most modern civilised countries have, as possibly some ancient ones had[120], authoritatively published Constitutions, of course in our time reduced to writing. Again, these written Constitutions are generally[121], to use

[117] See Dicey[7], p. 69.

[118] For the full explanation of *jus scriptum*, see below, § 6, pp. 317, 318.

[119] Freeman, Growth of the English Constitution[4], p. 112.

[120] Mostly however fabulous. As to Rome, the question of the Servian system and how far the Twelve Tables may be held to include a Constitution will be treated hereafter in the later sections of this work.

[121] Not necessarily. Exceptions are rather on the increase, notably in the case of self-governing English Colonies: see Dicey[7], p. 106. In the Union of South Africa, since the writing of the notes on that page, a considerable advance is made, as compared with Australia, towards flexibility.

Professor Dicey's expression, *rigid*: that is, they contain *inter alia* provisions of special machinery and often difficulty, by which *alone* amendment of the Constitution, or at least of certain of its leading principles, is to be effected. Our English Constitution is *flexible*; subject, like all our Law, to any amount of alteration by Parliament under the unlimited powers described by Blackstone and endorsed by Austin[122], though, as we have seen (above, p. 233), the latter sets up a supposed *trust* for the proper exercise of those powers which are reposed in the representative portion by its constituencies.

Constitutional Law and Constitutional Convention. A third difference, quite distinct from those above mentioned and rather between individual rules than between Constitutions as a whole, is thus put by Professor Dicey. In speaking generally of "the rules which directly or indirectly affect the distribution or the exercise of sovereign power in the State," he draws a distinction between such as are capable of direct enforcement by the Courts of Law and such as are not, the former being styled by him Laws of the Constitution, the latter Conventions of the Constitution or Constitutional Morality[123]. Both are generally included under the phrase Constitutional Law, but the distinction is a logical and reasonable one, which will be briefly considered below (p. 254). At present I wish to give attention rather to a particular case of limitation upon ordinary legislative Sovereignty furnished by *written* Constitutions of the *rigid* class, in which alteration is *not* legally competent to the ordinary law-making authorities; these being accordingly described as "legislative but not constituent."

An extraordinary Legislative. Almost all the Constitutions to which I am now referring have two legislative

[122] Blackstone, i. 161; iv. 36; Austin[5], 6. 246, 247.

[123] Dicey[7], pp. 23—29.

assemblies, and I assume Bicamerality. One of these bodies may be roughly described as the result of simple popular election. The other is differentiated in some of the many ways instanced above (pp. 205—223), and the requirements of the provision made for alterations in Constitution are naturally also very various.

In Federations, as might be expected, considerable majorities are required in the assembly representing the original component States. This, for instance, is the case with the German Empire and the United States[124]: but, in the somewhat exceptional case of Switzerland, the favourite method of Referendum can alone be used for considering and deciding the question of constitutional change[125].

In Unitary States may be mentioned such methods as dissolution and re-election of the ordinary legislative

[124] In the German Empire, 14 negatives out of a total of 58, in the *Bundesrath*, suffice to throw out any such proposal. (Prussia, it may be remarked, has 17 votes.) Regulations affecting the relation of an Individual State to the whole body can only be altered with the consent of that State (Art. 78). The decision, however, whether a particular proposal actually involves change of the Constitution or not may be decided by an ordinary majority. See Laband[4], i. 260. n. 3.

In the United States, besides a two-thirds majority in both Houses, amendments to the Constitution require ratification by three-fourths of the legislatures of the several States or by Conventions in such three-fourths. Art. 5. On the difficulties of satisfying these conditions, and on the non-user of State Conventions, see Bryce[3], American Commonwealth, i. 365—373 (ch. 33), and the same author's two following chapters on the interpretation and developement of the Constitution: see above, pp. 198, 199. Within the States themselves, the result of too narrow restriction by written Constitutions, or too strict construction by the respective Supreme Courts, is a continual amendment of Constitutions, 100 such being said to have been submitted to the legislatures of 1907. Soc. Comp. Leg. x. (1909, 1910), p. 286.

[125] For Switzerland, see Dareste, i. 509, as to the Constitution of 1874 (Artt. 118—121); for Amendments of 1891, Borgeaud's Adoption and Amendment of Constitutions of Europe and America (translation), p. 317; but principally Lowell, ii. 428, 429.

bodies[126]; their joint session without such dissolution[127]; or, as in the case of Switzerland, reference to the popular electorate itself[128].

In our English Dominions a difference of treatment or view obviously results from the times of establishment, in spite of the equality which seems to be contemplated by the Colonial Laws Validity Act of 1865 (28 and 29 Vic. c. 63). In Canada, which was united only two years later, changes in Constitutional Law, except as to minor points (practically matter of *judicial* legislation), still depend on Imperial Legislation[129]. In the Australian Commonwealth (1900) a Bill for amending the Constitution can be brought in the Australian Parliament: but must first obtain an absolute majority in each House, and then be submitted by the Governor General to the Electorate: if the Houses differ it *may* be so submitted for approval[130].

In the Union of South Africa there is no substantial restriction, but changes in the Constitution may be made by ordinary legislation, except with regard to certain expiring provisions, and except also as to certain qualifications in Cape Colony, and as to the use of the English and Dutch languages. In these excepted cases, a majority of both Houses sitting together is required, and the third reading must be agreed to by not less than two-thirds of the total

[126] Constitution of Belgium, § 131, and of Holland, §§ 194, 195. See Dareste, i. 86, 127.

[127] French Loi constitutionnelle relative à l'organisation des pouvoirs publics (25 Feb. 1875) § 8; Dareste, i. p. 11.

[128] So also by the French Constitution of 1852, § 32.

[129] So Keith, p. 999, and Munro, Constitution of Canada, pp. 265, 266.

[130] Constitution Act, 63 & 64 Vic. c. 12 § 128; Commonwealth Acts, Vol. i. (1901, 1902), p. 25, and Keith, pp. 924—927. Proposals for alteration in the Constitution were made in 1910 (Commonwealth Acts, Vol. ix. pp. 117, 118) but were not carried on the Referendum in 1911 (Keith, pp. 865, 868). The Referendum itself was regulated by Acts of 1906 and 1909 (Commonwealth Acts, Vol. viii. pp. 283—291).

number of members of both Houses. Here is a written Constitution, it is true, but, as to power of change, nearly approximating to our own flexibility[131].

The intention of most of such regulations is no doubt to make change, in the particular case of Constitutional Law, deliberate and somewhat difficult, but not generally to bring in a fresh legislative body. The object is mainly attained by special requirements from the existing Assemblies or combinations of them: and even where a fresh election is prescribed, as in the cases of Holland and Belgium, the new Parliament is still in form the regular legislative body, though constituted by a different set of members. Although, therefore, the original Parliament may not be a sovereign Legislative in the full sense[132], it seems more natural to regard these regulations, on the whole, rather as restrictions on the power of the ordinary Legislative, imposed by itself, or by some earlier authority, than as definitely constituting an ultimate and dormant legislative Sovereignty. The case, no doubt, of reference to electors or citizens at large, *has* more of the latter character, and will, as well as that of Constitutions in Federal or quasi-Federal States, require special notice hereafter.

Self-imposed limitations of Sovereignty. English instances. The principle that no sovereign power can "legally" bind, or allow to be bound, itself or its successors, in spite of the most obvious, or even expressed, intention to

[131] See Edw. 7. c. 9, §§ 35, 137, 152; Keith, pp. 998, 999. As to the free powers given to the Parliament, and as to the Constitution generally, see an article by the same author in Journal Soc. Comp. Leg. x. (New Series), especially pp. 56, 57, 62, 63, 67, 89, 90, &c.

[132] See, however, Dicey[7], pp. 120, 121 and 122, n. 1. Under the point of view taken above, compare, in the case of France, the new constituent body, which was to be summoned for modification of the Constitution in 1848, with the National Assembly of the two Chambers, provided by Art. 8 of the law 25 Fév. 1875.

do so, is, as we have seen (above, p. 237), strongly stated by Austin, and is illustrated, not merely by a somewhat questionable instance of Roman *privilegia*, but by reference to English history. Where a Sovereign is *corporate* or *aggregate*, individual members of the body may, he shews, be legally subject to obligations imposed by the whole, and this is matter of positive Law[133]. But enactments or engagements made for the guidance of the body as a whole, however important and definite, however clearly intended to be permanent, are but "positive morality" of no "legal obligation."

In a passage, partly perhaps suggested by a wish to differ from Blackstone, Bentham had admitted the possibility of assignable limits to the supreme power in a State, where the limitation resulted from "express convention"; such convention being understood to include the specification of certain principles, the violation of which, however effected by regular legislation, would give a "common signal" for resistance to the subjects, upon whose habit of obedience all political power depends[134]. The words are somewhat vague and general, but it would appear from his instances—the (old) German Empire, the Swiss Cantons, &c.—that the "Convention" intended by Bentham was not one between individual members of *any* state, like Hobbes' supposed covenant of every man with every man[135], but between corporate parts of a composite state.

Even in this case, however, whatever practically binding effect may have been allowed to such a "convention" by

[133] This case furnishes one explanation of Austin's statement ([5], 6. 267, 272, 273; St. 107, 110) that by Constitutional Law is meant a compound of positive Law and positive morality. For instances, e.g. the consequences of the rule that "the King can do no wrong," see below, p. 257.

[134] Fragment on Government, i. § 10; iv. §§ 21—22, 34—36, pp. 13, 111, 112, 120—122. The passage in Blackstone is i. Int. § 2, p. 49.

[135] Leviathan, ch. 17, p. 87. This is his "Social Compact," see P. J. p. 143.

Bentham, it is not allowed to stand against the stricter logic of Austin, according to whom a fundamental condition of Union, for instance between England and Scotland, declared to be fundamental in the Act, could not "legally oblige" the Legislature which in consequence of that Union, is Sovereign in both countries[136]. The hypothetical case put by Austin was the abolition of the Church of England or the Kirk of Scotland, neither of which has occurred. But his principle is exactly illustrated by the Irish Church Act of 1869, in which the provisions of the Act of Union passed in 1800, whereby the United Church of England and Ireland was to remain in full force for ever, *were* set aside as to this very fundamental part.

The Act of Union in question was, to all intents and purposes, a matter of mutual agreement and bargain between conflicting or competing powers, as is often the case with *written* Constitutions, particularly where the result is a Federal Government, such as that of the United States or the present German Empire. It came, therefore, under Bentham's exception to the illimitable character of Sovereignty, whether we consider that exception to rest upon his own *pro* and *con* calculations of "Utility" or, as most people would hold, upon the plain principle of good faith. Nevertheless it was, within present memory, overridden by another Act of Parliament; but passed, it may be remembered, seventy years later.

This is one of the instances on which Professor Dicey mainly relies, to shew that the legislative competence of an English Parliament is unlimited by any previous legislation, and conversely that an English Parliament is unable to place any limit upon the legislative competence of its successor[137].

[136] Austin[5], 6. 265.

[137] See Dicey[7], pp. 62—68: for the text of the Irish Act of Union, 39 and 40 Geo. 3. c. 67, § 5. See too above, n. 109, p. 234.

The logic, then, of Austin seems confirmed by actual fact, in the case upon which his reasoning is usually based—that of the British Parliament. And yet, even in this case, though more in that of composite states which partake rather of the Federal than of the Unitary character, we cannot but recognise a degree of academic unreality or verbalism in this dogma of the impossibility of self-imposed limitations upon legislative Sovereignty. An *immediate* overriding of the Irish Act of Union—say in 1801—on any fundamental point[138], even by our omnipotent Parliament, would have been, I venture to say, as practically impossible as a similar overriding of the German Constitution in 1872, even in the way provided by the Constitution itself.

I will not, however, anticipate what is to be said hereafter as to the sanction of Constitutional Law generally, but will confine myself to adding a few remarks upon the particular cases in which limitations of ordinary Sovereignty most naturally occur, and how those limitations are in rare occasions overridden.

The circumstances of Federal States have been treated, under the scope of the present work, with more consideration than is naturally given them, where the subject is simply or mainly that of Second Chambers. Their case has been compared with the relation of our own Colonies, or the more important of them, to our Imperial Government (see pp. 156—160): for both afford obvious instances of self-imposed and prospective limitations upon Sovereignty. I do not so much press the fact that purely external relations need some definitions;

[138] Brown, p. 161, alleges alteration of the Scotch Act of Union "within four years" after its being passed. I am not quite sure as to the particular alteration referred to; but I question its being any definite violation of the pledge to preserve Presbyterian Church government and discipline in the Act of Union. As to minor amendments made in the German Constitution in 1873, and the question whether that Constitution has or has not remained fundamentally unaltered down to the present time, see Lowell, i. 242, n. 1.

which are of much the same character as Treaties. But, besides these, or it may be in connexion with them (see n. 11, p. 159), the most nearly independent of our Colonies still, in fact, stand towards the Central Imperial or Mother Government in a relation, however slight, of subordination (perhaps we should say co-ordination), with regard to the discharge of *internal* powers, whether by statute or convention. This distribution, or division, of the *same sort* of sovereign powers is, as Professor Dicey points out, to be clearly distinguished from the balance or division of different ones, e.g. Executive and Legislative, within a Unitary State; and its existence is shewn by him to be a primary and essential characteristic of Federalism[139]. It appears to me equally essential in the case of these great and growing countries, Canada, Australia and South Africa, so long as there remains any connexion, beyond mere alliance, between them and Great Britain. So long there must be limitations of Sovereignty, both in the Imperial and the Colonial Government, which it is futile to talk of Parliaments being *legally* able to rescind.

Bearing therefore in mind the *two* objects to be combined in a Federal (or a quasi-Federal) Act of Settlement—on the one hand the maintenance of individual States or Provincial rights, and on the other a possibility of supplementation or alteration which time and changed circumstances may come to demand in any such settlement, Dicey proceeds to shew that a power of legislating on matters in question must necessarily be vested in an *extraordinary* body or combination of bodies, such as those referred to above (pp. 240—242). Otherwise the whole association will be practically an Unitary State, with large powers vested no doubt *pro tempore* in its component parts, but which are liable at any time to be divested by the action of its ordinary legislature.

[139] Dicey[7], pp. 142—152, and note on the division of powers in existing Federal States, pp. 477—480.

Such a proceeding is not at present likely as between Great Britain and her Colonies. Whether the slight degree of parallel conveys any warning as to the risk of too great facility in the way of ordinary legislation upon fundamental subjects *within the United Kingdom*, and far-reaching changes in its constituent parts or constitution, students of recent and current history must determine.

Being *here* mainly concerned with Federations as an instance of standing limitation of Sovereignty, I am not bound to compare them further, as to future fate and tendency, with our own Dominions. That tendency, however, does certainly seem to be, as distinguished from what was once believed in the latter case, towards Unitaryism. In the constitution of the German Empire we have, it is true, the Veto of the individual State and the possibility of the 14 negatives, as a protection of individual State interests. On the other hand, besides the exceptional position of the Kaiser (pp. 184, 213), the central legislative power already overrides that of the individual State, extending to a common legislation on the totality of civil and penal law and procedure[140]. In itself, the *Bund*, as a simple fact, is a great step towards Unity from the incoherent atoms of the Holy Roman Empire or the intermediate conditions. In the United States a similar progress has undoubtedly been made from a Confederation to a Federal State: and, even in Switzerland, the powers reserved to each individual Canton, although, as in the United States, indefinite[141], are certainly considered by many as gradually falling short of internal independence. But this possible ultimate tendency is not incompatible with an intended, and an intermediately real,

[140] Artt. ii. 2, 4, 5, 13. The German Empire is, in fact, specially treated as a nondescript by Prof. Harrison Moore in an Essay which certainly shews many difficulties in distinguishing between a Federal Union and a Unitary State. Law Quarterly Review, xvi. pp. 370, 374, &c.

[141] See Dicey[7], pp. 476, 477.

permanence in the provisions of Federal Constitutions, not only in those which are more expressly matter of bargain between the original parties, but in other regulations essential for the common good, or regarded as such at the time of Union.

This amount of permanence, apart from any difficulties purposely interposed by specification of an extraordinary legislature being required for change, is, as a matter of observation, the effect of *written* Constitutions in general, Federal or otherwise. They are from time to time amended in minor points, and are, as we shall see, capable of being stretched by Interpretation: but they are rarely abrogated or overridden in a fundamental matter, until, by lapse of time, relations and circumstances have gradually arisen or come to light materially different from those under which the original arrangement was made, or some paramount national emergency demands immediate solution. The former explanation—to take a case not unlike the legislative violation of a Federal Act of Union—expresses what, in the opinion of a majority, justified the Irish Church Act of 1869 (above, p. 245), which would surely have been, in 1801, an inconceivable breach of faith. Much the same is the justification which may be fairly made out—besides that of success—for the American Union as against the seceding States of the South. For the latter would certainly seem to have been acting within their rights on a strict judicial construction of the original Constitution of 1788—9[142].

This case, however, is one of that extreme character which transcends ordinary constitutional Law, convention or usage. The amendment, in practice or general feeling, of the original Federal Union in America, as to any supposed right of Secession[143] might be regarded as a sort of Convention, the gradual work of time; but the literal alteration of the

[142] See Bryce[3], i. 421—424. [143] ib. pp. 322, 337.

Constitution, in respect of slavery and coloured citizenship[144], which followed the war, are in reality successful revolutionary movements, due practically to main force.

Although this appeal to arms, in the American Civil War, was ostensibly Conservative, the case, in respect of its immediate causes, is not altogether unlike an earlier one, in which the fault of over rigidity—to be set against the merit of permanence—had the effect of bringing the whole fabric to the ground. The "immutability" of successive French Constitutions is not improbably connected by Professor Dicey with their early and violent ends: even the *coup d'état* of Louis Napoleon may be regarded as caused, and to some small extent excused, by the inflexibility of the provisions governing the Presidential Election in 1851[145].

On minor points, and more, perhaps, in comparatively recent times, we may accept M. Esmein's assertion that the French Constitution, in its present form, has been modified "dans une certaine mesure par voie d'interprétation" on the part of the French Judiciary[146]. The actual working of such modification, in a written and rigid Constitution, is, however, better illustrated by normal American experience, as distinguished from the arbitrament of arms by the War of Secession.

Mr Bryce, meeting the doubt which has been expressed as to how much stability is really attained, in Constitutions like that of the United States, by embodiment in an Act of public legislation, justly puts very high indeed the *moral effect* in strengthening the conservative instinct of a people—an instinct not, of course, confined to the American nation[147]. Recognising, however, at the same time, the necessity for progress and improvement which must apply to all kinds of

[144] Additional Articles, xiii.—xv.; Bryce[3], i. 709. See also ib. p. 369.

[145] See Dicey[7], pp. 124, 125.

[146] Esmein, Droit Constitutionnel, p. 483.

[147] Bryce[3], i. 406, 407.

Law, constitutional or otherwise, he writes thus (in his chapter on "Development by Usage") of the body which is theoretically regarded (see above, p. 197) as the "Guardian of the American Constitution." "Ordinarily the Supreme Court is apt to find grounds for moving in the direction which it perceives public opinion to have taken, and for putting on the words of the Constitution a sense which legalises what Congress has enacted or custom approved.... But, if the needs of the time be pressing, Courts and Constitution may have to give way...and the safety of the Commonwealth be secured, if possible in conformity with the Constitution, but, if that be not possible, by evading or even overriding it[148]."

As a matter of fact, it is remarked by Professor Dicey that the Constitution of the United States actually consists at present to a large extent of Judge-made Law[149]. This is, no doubt, a good deal the result of *logical* rather than *grammatical* Interpretation (see above, § 3, p. 122). Even in the cases of emergency suggested by Mr Bryce's startling words last quoted above, the practice recognised as most likely to be followed is not so much the Austinian idea of a Sovereign's legislative freedom from previously imposed limitations, as a fight for life or death.

One particular method by which an awkward result, from an impracticably obstructive veto of the Supreme Judiciary upon *primâ facie* "unconstitutional" legislation, might be obviated, has been placed by American writers in the power which Congress (the ordinary Legislative) possesses, of increasing the number of Judges and so strangling opposition by the voices of the new appointees[150].

This suggested manipulation of the American Supreme

[148] Bryce[3], pp. 396, 397. [149] Dicey[7], p. 467, n. 1.

[150] Crane and Moses, "Politics," p. 217. See too, Bryce[3], i. 276 and Dicey[7], p. 175.

Court is somewhat cynical. It almost compares disadvantageously with the theoretical English method (see p. 210) of getting out of a rather similar deadlock, i.e. an irreconcileable disagreement between the Houses of Parliament, by the creation of a sufficient number of new Peers, in whom, after all, political partisanship might be more naturally expected, and, according to the present code of political morality, more readily excused, than in Judges.

The deference, however, paid to recognised constitutional rules, whether *written* or *unwritten*, positive Law or positive Morality, seems to be much the same in these two suggested expedients. They are transparent *evasions*, and may be construed (as hypocrisy is the homage paid by vice to virtue) into definite admission of a *normally* binding character in the rules which, for the nonce, they override, under pressure of an extreme and unusual occasion. Similar causes have led to proposals of *amendment*, earlier than might be expected, in written constitutions: but these may be taken not so much as arguments against the laying down of prospective constitutional principles, as that these should be few and wide or general. This, at least, appears to me to be the moral of certain suggestions for amendment of the Australian Constitution Act: that statute having been found to work inconveniently with reference to fiscal arrangements which it might seem better to leave for ordinary legislature but which it has been proposed to make a constitutional question[151]. Enough, however, has been said as to the practical futility of talking about prospective limitations of Sovereignty being impossible, or immediate change of them *legally* possible.

[151] I refer to the questions and proposals raised by the "Harvester" cases. See, as to the possibility of continual tinkering with the Constitution of Australia as contrasted with that of the United States, Harrison Moore, Constitution of Australia, p. 332.

The question of Ireland. Here, if anywhere, may be inserted one of the few direct references to current politics which I feel myself justified in making. The measures now under consideration for the improvement of relations between Great Britain and Ireland, and of the condition of Ireland itself, are often illustrated by comparison sometimes with the position of our more independent Colonies, sometimes with that of foreign federated countries. I must say that, in the former case, geographical position deprives such a comparison of any practical value; apart from the change of feeling, in favour of a continuing unity, which has undoubtedly taken place, in the last 40 or 50 years, both at home and in the Colonies. This change has been attributed by rather a favourer of Federation (Bryce, i. 352, 353) to the influence of Queen Victoria's long reign and an increasing reverence and affection, not only for her personal character, but for the ancient institutions at the head of which she stood. One golden link has been snapped: is it hopeless to believe that as strong a one remains, in the shape of love for the old land and for all that has made it so great? And the greatness, the very existence, of the British Kingdom can scarcely allow possibilities of independent national action, so near our shores, in the face of European complications and dangers, of which it will take all the wisdom of our diplomats to steer clear.

The case of foreign federation, particularly perhaps that of America, affords a nearer parallel, though there are wide differences between the history, with all its consequences, of other members of Federations and that of Great Britain and Ireland. The author above quoted contemplates elsewhere, with a lively appreciation of their inconvenience, suggestions for a plan of splitting the United Kingdom into a Federation of smaller States or making it a member of a great Federation (Bryce, Studies, i. 245, 246). The question

more directly discussed, is that of our constitution becoming a *rigid* rather than a *flexible* one (see above, p. 240); but on the more general point of the legal and practical difficulties which any such plan would involve, Bryce's opinion is obvious. I may add that the same authority, in his new edition of The American Commonwealth, a subject on which he is peculiarly entitled to speak, appears to me somewhat to modify the views previously taken, in view of that Constitution, as to the balance of advantages in a Federal over a Unitary government generally (Bryce, Supplementary Note, i. 358, 359).

I must, however, end this digression by maintaining most strongly, that the case of Ireland is a unique one, to be settled on its own merits, and on which, in my opinion, very little useful light can be thrown either by our own or foreign precedents.

Customary rules of Constitutional Law. A somewhat large amount of space has been devoted to limitations of legislative Sovereignty, self-imposed by a statutory instrument, because these cases of *written* Law put in the strongest light the meaninglessness of the Austinian dictum as to their non-legality (above, p. 252). But, in respect of efficient Sanction, these and the more important rules of Customary Constitutional Law stand on the same footing, if the latter, though technically "unwritten," are clearly ascertained and generally known. Both depend in the last resort upon the continuing assent of the community at large, whether they are embodied in statute or are merely "principles and maxims which the Sovereign habitually observes and which the bulk of the Society, or the bulk of its influential members, regard with feelings of approbation[152]." It is, of course, of the more important or fundamental of these customary rules that

[152] Austin[5], 6. 266, and above, p. 237.

Freeman speaks when he says, in language nearer the truth than Austin's, that an offender against such regulations "would be universally held to have trampled under foot one of the most undoubted principles of the unwritten but universally accepted Constitution[153]."

If I might endeavour to put these somewhat indefinite though high-sounding expressions of approbation and disapprobation into the practical form of an Austinian Sanction, I should have once said that the rules in question are not and will not be violated, because "it is highly probable that the subject-body, *or a considerable portion of that body* (see below, p. 259), will resist such an exercise of Sovereignty," and all its legal consequences. But I admit that recent events must somewhat modify my statements as to English Constitutional Law and its presently operative Sanctions. For the recent Parliament Act did, in my view, violate an old and well-recognised principle of our Constitutional Law, but was allowed to pass, and now calls consequently for speedy amendment if not total rescission.

The Sanctions of Constitutional Law. In what follows, I have ventured to employ, for more general purposes, a statement, slightly modified, of what Professor Dicey terms the "external limit" (quoted above), which prevents an extravagant use of strict *legal* Sovereignty in the way of ordinary legislation, in England—the "internal" limit lying in the moral feelings of the Sovereign, himself or itself, as influenced by the social conditions of the time[154]. The *reductio ad absurdum* suggested, in the instance put, is inconceivable. Equally inconceivable, at the present day, would have been an Act of

[153] Freeman, Growth of the English Constitution[4], p. 117.

[154] See Dicey, pp. 78, 79. The two limits appear to be the original idea of Sir Leslie Stephen. He put, as the *reductio ad absurdum* of "omnipotent" legislation, an enactment that all blue eyed babies should be murdered.

the British Parliament, which Austin says might be perhaps "unconstitutional" but not "illegal"—an Act which should vest legislative power solely in the Upper House[155]. But a legislative change in the opposite direction is neither inconceivable nor irreconcileable with the moral feelings of what many regard as our present legislative Sovereign; but would yet, unless I am much mistaken, not only incur the disapprobation but might have been expected to arouse the resistance of a considerable portion of the community. This check, not, perhaps, amounting to a danger of civil war, but a probable form of which might be that stated below (p. 259), constitutes the only ultimate Sanction of rules that are everywhere, except in the almost inconceivable case now-a-days of a pure despotism, observed by the Sovereign, whether they are embodied in an Act of legislation or not. I refer chiefly to the rules which determine *where* the Sovereignty itself is vested: a matter, of course, descending largely from past history, but dependent none the less upon a continuing common assent or approval. The rules which regulate in more detail the relation of members of a *corporate* Sovereign to one another or which determine the mode in which such members exercise their authority[156] are of slightly, but only slightly, minor importance.

It will be remembered (p. 240) that within the domain of our Constitutional Law, as generally understood, Professor Dicey distinguishes between Laws of the Constitution, which are capable of direct enforcement by the Courts of Justice, and Conventions of the Constitution, which are not. This distinction is not identical with that between "written" and "unwritten" Law, nor is it confined to countries which have an "unwritten" Constitution, though it belongs

[155] Austin[5], 6. 268; St. 108.
[156] Dicey[7], pp. 22, 23.

mainly to the latter class of Law and is mainly illustrated by its author from our own case, which still belongs in great measure to that class of country. Some of our "Laws of the Constitution" are matter of statutory enactment, so that an offender against them is obviously guilty of a legal crime, and can be proceeded against directly before a legal tribunal. Others, of which Dicey gives as an instance "the King can do no wrong" (i.e. Ministers are responsible for his acts), though "unwritten" are, nevertheless, in a somewhat indirect way enforceable by the Courts[157]. (Any one such enforcement, it may be remarked, would bring them fairly under Austin's definition of Judiciary Law, i.e. Law set by the Sovereign through the Judges as his appointees and delegates.)

What we are concerned with at present are Dicey's "conventions" of any Constitution—the customary rules, that is, of Constitutional Law which not only belong to the technically "unwritten" Law but are also *not* enforceable by Courts. They are of all degrees of importance. Some are matters of little more than etiquette, enforced by the general feeling and traditional custom of legislative assemblies. Some, like the elaborate rules of the party system in America[158], while they undoubtedly affect, in practice, the legal rights of an electorate, appear to be supported mainly by a strong sentiment of political honour or "playing the game." But others regulate the effective conditions of legislation, and settle the constitution of the Supreme legislative body, the "legal Sovereign" itself. It is of these more fundamental rules that I now speak. The part of a Judiciary in enforcing them must obviously be, except by very

[157] See Dicey[7], pp. 24, 25, and Freeman, Growth of the English Constitution, pp. 116, 117.

[158] See, generally, Bryce[3], vol. ii. Pt. iii. On the particular point as to Presidential Electors, ib. p. 179: also Dicey[7], pp. 28, 29.

circuitous reasoning, of a negative character, e.g. that of declaring invalid, or refusing to apply, a law unconstitutionally passed. We have seen how this operates under a written constitution like that of the United States, where such a case is distinctly provided for by the powers reposed in the Supreme Court (above, pp. 198, 199). But what, in an "unwritten" Constitution, like our own, or in a written Constitution which contains no such provision, is the practical sanction, if any, of these Constitutional Conventions? A Judge may resign, rather than carry out what he considers an unconstitutional law, as six Judges did after the affected statutory abolition of the legislative power of the King and House of Lords in 1649[159]: but this, though a very impressive protest, is only a protest, and lawyer politicians would always be found to fill the vacant place. Professor Dicey, as I understand him, finds a sanction for his Conventions of the Constitution, in England, in the special inconveniences which would arise from their infraction under the ordinary law of the land. He instances the individual legal difficulties and liabilities that would follow upon a breach of our constitutional rule that Parliament must assemble at least once a year—the consequent expiration of the Mutiny Act, the failure of Acts annually passed for certain branches of taxation, &c., &c.[160]. This is a particular national case, though probably similar inconveniences or collisions might be pointed out as likely to ensue from breaches of Constitutional Law or Convention elsewhere. The virtual or resultant sanction, however, here suggested would have no application in the event of a positive, but extravagant, use made of the regular legislative authority. To this possible abuse of Sovereign omnipotence Professor

[159] See the first pages of Hallam's Constitutional History ch. x. pt. 2, &c., &c.

[160] Dicey[7], pp. 441—444.

Dicey has himself called attention elsewhere (see above, p. 255) and indicated, as its probable result, what appears to me to be also the real Sanction of all Constitutional Law (in the wide sense of the term), the infractions of which are not cognisable by the ordinary Courts of Justice, namely the disapproval of the subject body or a considerable portion of them, and, if not open revolt, at any rate resistance to all legal demands directly or indirectly connected with the extravagant or unconstitutional Act. The immediate ground of such resistance may generally be resolved into some common feeling of great *injustice* entertained by a considerable or important number of the community at large—not necessarily a majority, which is the reason why I ventured to italicise the words to that effect in Professor Dicey's phrase. This is, in fact, part of the protest against government by bare numerical majority, which will be more fully treated of a little later (p. 276).

"External limit" of legislative Sovereignty. In the latter part of the preceding paragraph, as before (p. 256), I have ventured to hint that the occasions for the application of Professor Dicey's external limit may not be confined to impossible or absurd cases. Acts of ordinary legislation, not involving any breach of Constitutional Law or Convention, by our Sovereign Legislature, may be suggested, which are not unfortunately inconceivable under our present Party system and Parliamentary practice, which the Judges would, I presume, consider themselves in duty bound to administer, but which would, I believe and trust, meet with the resistance to which I have referred—a resistance only justifiable, I admit, by their being, or probably leading to, extreme cases of injustice or oppression.

An Act of Parliament throwing practically the whole burden of taxation upon a wealthy minority is quite compatible with the system of Differentiation already introduced

in our Income Tax and Death Duties, and with the principles openly avowed by a growing body of Socialist politicians, with the sanction of a considerable number of religious enthusiasts. The application of the principle will of course be cautiously represented as one under which only "the rich and the very rich" shall be taxed—and such arguments as this used, which I take from one of the best Radical papers. "Out of the 1,000,000 Income Tax payers there are not more than 200,000 who pay a shilling in the pound" (Westminster Gazette, July 20, 1908). The voter, who has hitherto been bought off by remissions and exemptions, may rejoice that he is not one of the 200,000: but there may come a day when he will see that he had better have taken stand, on the ground of Justice, with his richer neighbour, while there was yet time to resist the insidious beginnings of wrong.

Let us pass, however, from an extravagant use of the ordinary legislative power to a legislative breach of fundamental Constitutional Conventions—amongst which we must still be allowed to reckon the principle that the British legislative power generally is vested in the *two* Houses of Parliament[161]. Now, there are many who would call the Septennial Act above referred to (p. 234) at any rate a very strained instance of legislative power, the exceptional product of a revolutionary period; and few who would admit the possibility of its being followed as a precedent. But I do not mean here to speak so much of the extension of an individual Parliament as to note the *company* in which the Septennial Act is, quite naturally, placed by Austin. For of course he has this case in mind when he speaks of the possibility of Parliament lengthening its own duration from seven to twenty years and then, in the next breath, of annihilating the actual Constitution, by transferring the

[161] I leave out of the question the Veto of the Crown upon Acts of Parliament, which may be considered as, by Convention, really obsolete.

Sovereignty to the King or Peers[162]. Such an Act is inconceivable at the present day; but a similar Act, in the interests of the Commons, is according to the present views of Democracy, far from inconceivable. It is quite within the bounds of possibility that a House of Commons might be returned with a majority pledged to abolish all authority, as of a deliberative legislating body, in the so-called Upper House, and that the existing members might be weak enough to sign the political death-warrant of themselves and their successors, or a Prime Minister determined enough to secure the creation of a sufficient number of Peers for the purpose. In this case, if the legislative authority in question had long been disused by its owners, like the Royal Veto, it might no doubt be fairly maintained that a new rule of Constitutional Law (or, according to Professor Dicey, Convention), had grown up, whether it might or might not be wise for this to be statutorily recognised. But if no such desuetude could be alleged, it is possible that a not inconsiderable minority in the State might hold the fundamental Constitution of the ultimate legislative authority too much a matter of national concern to be destroyed even by that authority itself. Professor Dicey's "internal limit" to Sovereignty being understood to have failed, there could only remain the "external limit" which lies in the possibility that the "subjects," or a large number of them, will disobey and resist[163]. There is, certainly, a very important minority in the Britain of to-day which would see, in the reduction to impotence even of the present House of Lords, with all its faults, the loss of a principal representative, not merely of landowners and the large accumulations called capital, but of individual property and individual commercial enterprise in general.

[162] Austin[5], 6. 248, 268.

[163] Above, p. 259, also Dicey[7], p. 74.

Free and despotic government. Here, if anywhere, seems to be the place for enquiring what real difference may be usefully expressed by the above inaccurate antithesis. For a moment's consideration will shew that the first epithet is proper to the Subjects and only the second to the Sovereign. If we apply both to the latter the whole phrase is tautological: the more free a "government" is from any practical limitations, whether legal or conventional, the more nearly it approximates to the rule of an individual arbitrary master or despot. The difference which is actually intended lies in the comparative amount of "liberty" enjoyed under one or other form of government by the individual subjects or citizens. The meaning of this "liberty" I shall endeavour to ascertain, after briefly noticing some views of Bentham and Austin upon the phrase which heads the present paragraph.

Bentham, maintaining throughout the omnipotence of the Sovereign or supreme power in a State, makes the freedom in a government depend upon the *distribution* of that power, the *sources* from whence it is derived, and the comparative facility with which the governors may be changed: the *responsibility* of the latter also he takes to be assured by the *liberty* of the *press* and the *liberty* of *public association*: but there is very little *positive* on the condition of the *subject* in the passage which Austin had apparently before him[164]. Austin, after premising that the Sovereign or supreme power is incapable of legal limitation, proceeds to define political or civil liberty as the amount of freedom from legal obligation which is left by a State to its subjects. But, assuming that *free* is used as a term of praise and *despotic* of blame, he contests a popular inference that the comparative goodness or badness of a government does really depend on the mere amount of such liberty, without reference to its

[164] Fragment on Government, ch. iv. § 24 and the following sections.

object or tendency. Now the rights conferred and the duties imposed by a State on its subjects (or conversely, the freedom left them) ought to be conferred or imposed for the common weal; and are supposed to be more so in a *popular* government, i.e. one which bears a large proportion to the number of the whole society. Consequently, by a *free* or good government is usually meant a democratic or popular one; by a despotic, or bad government, a monarchy, narrow aristocracy (see p. 201) or oligarchy[165].

All this may be taken for *quantum valet*: it certainly does not express or explain the ordinary conception of a free or despotic government, which is, I think, correctly defined in Austin's first words. Professor Brown has an interesting note commenting on this passage[166], part of which may be considered here. The distinction drawn by him (No. 3) between "liberty" and "right" is better postponed to a later section of this work, where an individual right is attempted to be defined. For the rest, the author, identifying "liberty" generally with the power of self-determination or self-developement, contrasts this power in its civil and its *political* aspect, as being secured, in the former case, by protection from interference, on the part of government as well as of one's fellow-citizens; in the latter by allowance of franchise and representative government. The second may be regarded as a mere guarantee of the first, or as an independent right. But from either, or both, our author proceeds to his ideal of the liberty which *ought* to exist; an ideal of self-government, which was certainly only very indefinitely present, if at all, to the minds of Austin or Bentham. "The ideal," he writes, "of political liberty looks forward to a Society wherein the wisdom and virtue of the whole community triumphs over the sinister interests of a class or individuals—a condition to the realisation of which a democratic constitution, which is

[165] Austin, 6. 281—285. [166] Brown, pp. 177—181.

often made synonymous with political liberty, is but one of many means." If, in this passage, we read for "political liberty," "wise use of the franchise and representation," I agree with every word of it: for it is tantamount to saying that the State is to be regarded as an organic body, rather than as an instrument for the aggrandisement either of individual men or classes.

But, with all due deference, I think that the pedestrian and commonplace conception of a free government, as one which interferes as little as need be, with the subject or citizen, not only squares with the "noble thing" of which old Barbour sang[167] but has a special meaning at the present day.

The power to do as one will with one's own person and property, must of course, in any human society, be restrained by the rights of other members of that society and the good of the society at large: but the amount of residuum left, after restraints and impositions, is surely not untruly regarded as the test of a free or despotic government. Even if it be, as supposed, for one's good, there can scarcely be conceived a more servile, or less self-developing condition, for the individual, than to have all the minutiae of his conduct regulated by the paternalism or maternalism of the most fully developed Democracy. The real despotism to be dreaded, at least in the most "advanced" nations, is that of the small official (above, pp. 193, 194).

Formulation of Constitutional Law in general. The formation of Constitutional Law in the "written" form, by enactment, has been sufficiently dwelt upon. That, even in this case, finality is but the pious hope of the legislator, not attained or attainable in practice, is shewn abundantly by experience. The process of developement in a written, and the process of building up in an unwritten, Constitution

[167] The Bruce, i. 225.

depend so much upon the agency of legal Literature that I propose to consider both, together with similar phenomena in the case of International Law, under a common heading "The function of the Text-book writer" in a later section (9).

Political Sovereignty. A student of Jurisprudence must confess to a certain hesitation in stepping into the field of present politics. He has to submit the axioms and definitions which have been accepted, as matters of reasoning, by himself or his predecessors to the rough test of an actual crisis: he may even think it his duty to shew that some of the scientific problems in his subject are vital issues which must be faced without delay. Among these issues, such questions as the relation of Representatives to Constituents, or of the more literally representative Chamber to that which is only indirectly so (see above, p. 207), will be readily admitted to the general, and somewhat languid, consideration of the ordinary politician or "man in the street." But these same authorities are less disposed to note that a rapid and unmistakeable change is requiring most of such relations to be thoroughly reconsidered; and that some of the old half-discarded theses are beginning to assume a disquieting reality in the hard light of our present day.

The question, for instance, where the "political sovereignty" of a State should be held to reside, looks academic enough to remain a monopoly of the Jurist or Philosopher. But when the enquiry developes into discussion of what is called "direct legislation by the People," we come very soon on matter of interest to the most ordinary tax payer or owner of property. Without further apology, therefore, I propose to consider the meaning and gist of a "political Sovereignty," particularly in present England, and to discuss certain current opinions on the subject which appear to me to be false and to tend to mischievous conclusions.

A few words will suffice to explain how the expression

"political Sovereignty" arose. The well-known Austinian definition of a State or Political Association postulates an omnipotent Sovereign—in almost all modern cases a "corporate" Sovereign or sovereign *body*, such as our Parliament of King, Lords and Commons; to which corporate Sovereign Blackstone, in fact, expressly attributes omnipotence, in everything that is not naturally impossible.

We need not here go into the difficulties of Austin's definition of Law, or the propriety of the term Law as applied to Constitutional rules and principles. We may be allowed to assume that in any Political Association, short of an absolute tyranny, there are such rules and principles, either "written" or customary, which can be shewn actually to limit the ordinary sovereign body, even in its ultimate and highest function of legislation; as they obviously do, for the time being, determine the constituent parts of that sovereign body itself.

Attempts have been occasionally made to reconcile these facts with Austin's omnipotent Sovereign, by the supposition of a so-called *political* Sovereignty besides or behind the ordinary *legal* one, to which political Sovereignty the Austinian omnipotence may be truly attributed. Now, agreement with the canons of Austin is not perhaps at present considered so material as it once was. But the theory of political or ultimate Sovereignty, combined with certain other assumptions, has been and no doubt will be used to justify measures, which are to say the least, detrimental or unpalatable to a large and important body of our community.

Where, in the English Constitution. In England it is, for the present, statute law (see above, pp. 208, 209) that, with the one exception of self-prolongation, the House of Commons is, in all matters of dispute with the other branches of the Legislative, ultimately to prevail. And, in accordance with

this principle, while it was still a matter of "convention," Professor Dicey held that the body of electors to the House of Commons is the true "political Sovereign" of England[168]. We need not speak of other branches of sovereignty in this point of view: the Judicative and Executive *must* be only *legal* or ordinary (see below, p. 274).

If the present allocation of ultimate power be permanent, it is, apparently, with many, a matter of *convenience* rather than of principle, whether we shall or shall not adopt, in our legislation, a *reference* to the vote of our Electorate, such as is now available in Switzerland, in the United States, in the Commonwealth of Australia; and whether this reference shall be confined to alteration, or declaration of principle, in the Constitution, such as was made by the Parliament Act, in England, or be extended to other legislation, as it practically is in the first of the above three cases and in some State legislatures of the second[169]. I cannot agree with these conclusions, even allowing the "convention" to be true: and accordingly shall have to speak, later on, of the actual acceptance and working of the Referendum. I confine myself at present to a discussion of Dicey's convention as a general principle, taking however the case of England as fairly typical.

The ultimate prevalence of our House of Commons is sometimes claimed in the formula that "the Will of the People ought to be obeyed." "The People" is often a mere rhetorical phrase: but, when reduced to a definite meaning, in claims like this, it generally signifies the Electorate to the more popular of our two legislative assemblies. Even in this limited sense, it has naturally been questioned whether the Will of the People is truly brought out under our method of

[168] See Dicey[7], pp. 425, 426 and Brown, p. 115, note.

[169] See, as to Switzerland, pp. 213, 271. As to American State legislatures, ib. and the latter part of Bryce[3], i. 468—476. His arguments in favour of direct popular legislation in these latter cases appear to me to depend less on its own merits than on the demerits of the existing State legislatures.

settling questions by a simple majority of representatives of voting majorities. I am not, however, proposing here to enter into the suggested attempts at giving each voter some weight in the choice of his representatives by schemes of proportional representation. Such suggestions in general only go as far as election. Whether a similar grievance, to that which prompts them, as applying to the ultimate legislative assembly, can in practice be remedied, is a point to be considered hereafter (see p. 290). It is certain that the difficulty of requiring more than a simple majority on any question, and, on the other hand, the discontent of a minority possibly by one, must be emphasised in a direct reference to the People, whether confined to the Electorate of the popular assembly or not, as ultimate legislators.

Discussion of Dicey's Convention. Now, with regard to Professor Dicey's constitutional convention, alleged for England, on the ultimate general supremacy of the popular House, it must be recognised that this doctrine is not by any means positively held in other countries with two Chambers[170]: that it has been directly questioned in our own[171]: and that it is only adopted with considerable qualifications, if it can be held to be adopted, in our own latest specimens of Constitution-making, those of Australia and South Africa. In saying this, I am aware that the *elective* character of the Second or Upper Chamber no doubt alters

[170] I refer, for the sake of brevity, to the provisions for avoiding a deadlock between the Upper and Lower Chambers, principally with regard to Upper Chambers elected on a popular basis, in Continental Countries, as stated by Temperley, p. 285.

[171] Compare Dicey[7], p. 427, with Hearn, "Government of England," pp. 169—178; where the latter, however, amongst other things, points out that a distinction has been drawn, in several past instances, between a disagreement of the Lords and the Commons on a question of *administration* and of legislation. Lowell (Government of England, i. 405, 406) is evidently in agreement with the view of Dicey.

the question in these two cases. In the former, however, it is only after a simultaneous dissolution competent to (though not binding on) the Governor General, that a measure can be carried, in joint sitting of the Houses, over the heads of the Upper[172].

In the latter the proceedings are more summary, but in both there is the opportunity for persuasion—*valeat quantum valet*—in discussion between the entire Chambers. The much more likely method, in my own opinion, of securing agreement, by a conference of Commissioners, is favoured by several Continental Governments[173], while others have (see above, pp. 216—219) adopted in practice the English theory of *swamping*, which has been used, though discouraged by the Home Government, in several of the unincorporated English Colonies[174]. On the whole it cannot be said that the simple idea of the submission of an Upper House to a Lower has by any means received universal approbation.

The **Referendum**, or reference to an Electorate, is provided for, and apparently required, as we have seen, on proposals for alteration of the Constitution of Australia: but not for amendment of the South African Act[175], which, subject to general regulations on disagreements between the two Houses, and special provisions on the proposed amendment of certain sections, gives to the Parliament much the same legislative sovereignty, and to the Houses much the same assortment of subjects, as in our own case. The latter constitution is regarded by Keith as "more advanced" than

[172] See above, pp. 221, 223.

[173] Temperley, pp. 121, 122, instances Spain and Portugal, referring further to his Table iv. pp. 284, 285.

[174] See Temperley, Appendix 6, pp. 269—273.

[175] Compare 63 and 64 Vic. c. 12, § 128 with 9 Edw. 7. c. 9, § 152. See also §§ 60—63, and on the use, or otherwise, of the Referendum in the Dominions generally, on Money Bills and deadlock, Keith, pp. 640—643, 922—938.

that of any other English Colony. With regard to Australia, we may note that this is not the first appearance of the Referendum on English ground, but at present I only propose to consider it as finally adopted in the Constitution Act of the Australian Commonwealth sanctioned by the British Parliament (see last note). It is there limited to measures of Constitutional Amendment and in its primary use is treated as a genuine Veto: it being provided that an Act dealing with this subject must have first been passed by an absolute majority of each House, and *also* be ratified by majorities of the voters in a majority of the states: but the Referendum *may* be used, with the consent of the Governor General, to carry such a measure over the head of either dissentient House. There is, however, no instance as yet of such an employment of it in this case[176], although its ordinary use occurs repeatedly. The use of the Referendum for either purpose, has been very thoroughly discussed, with an unfavourable conclusion, by Professor Brown, belonging to the University of Tasmania, in which Colony a modification of Hare's system of Proportional Representation was actually adopted in preference[177].

In Switzerland, the birthplace, and generally quoted as the most favourable instance, of the Referendum[178], this method is not necessarily confined to revisions of the Constitution, but may be applied to *any* Federal law, or resolution of a general character[179], but not of an urgent nature, on

[176] Keith, p. 927, writing in 1912.

[177] Brown's New Democracy. See the chapters on the Hare System with special reference to its application in Tasmania, and on the Referendum (chaps. 3 and 4). On deadlocks especially, p. 110.

[178] I do not take into account the short-lived French Constitution of 1793, nor the ancient instances referred to by Bryce[3], i. 466 and M'Kechnie (Reform of the House of Lords, p. 80).

[179] As to the difficulty of deciding on this general character, see Lowell, ii. 253.

demand made by 30,000 voters or eight cantons. So far it is a pure Veto. On the other hand, what is called the Constitutional Initiative, affords an opportunity, on petition being secured from 50,000 voters, of starting proposals, drawn up in final shape (*rédigés de toutes pièces*), which, to omit details, may even be carried ultimately against both Houses by popular vote[180]. I must refer to the text for safeguards which are undoubtedly provided, but would remark that this popular initiative has in fact been extended to matters of a very questionably constitutional character[181]. It has been indeed suggested that *any* Bill, if its framers can couch it in the form of a constitutional article, can be forced through by means of the so-called Constitutional Initiative[182]

A substantive Initiative, similar to that Federally limited to partial revision of the Constitution, exists, for more general purposes, in some of the separate cantons. But the whole principle of such Initiative has been severely criticised by leading authorities among the Swiss themselves. For these criticisms and for a general discussion of the whole subject, I would refer to the excellent chapter (12) on the Referendum and the Initiative in Lowell's Governments and Parties, particularly pp. 281—300. His approval of the system, as on the whole beneficial, does not, I think, extend beyond the Referendum in its negative use, as a Veto.

In the Federal Government of America he represents the popular vote not only as confined to a Veto, but also to

[180] Articles 121—123 of the Constitution, as adopted in 1874 and revised in 1891. See for text, Lowell, ii. 401—431.

[181] E.g. the mode of slaughtering animals, Aug. 30, 1893. See Lowell, ii. 284 and the summary on pp. 260, 261.

[182] This opinion, quoted from the Edinburgh Review, No. 431, p. 137, is on the whole endorsed by Marriott, pp. 287—295. Mr Temperley puts the matter that "in Switzerland the direct Sovereignty of the people has made itself felt," and the authority of Parliament is giving way before it, p. 211.

subject matter either directly Constitutional or which might without any great stretch be represented as such. Any further extensions of the Referendum appear to be confined to the individual State legislatures, mostly those of the later States, in which the Initiative has been largely adopted[183]. But, in the Federal legislation of the United States, any application of the Referendum to laws *in general* is denied by Lowell as a matter of fact and deprecated as a possible developement. The idea of adopting a popular *initiative* in this case he scarcely, indeed, thinks it necessary to discuss. The same passage points out very clearly the differences between the voting population in Switzerland and in the States[184].

To return for a moment, to the most favoured instance, of Switzerland: it may surely seem questionable whether any sound analogy can be drawn, at present, between this country and England, or even other European nations. The political character and capacity of the Swiss popular electorate are still, it is submitted, too unique (like the country's geographical position) for their institutions to be closely compared with those of other political societies or their example to be safely followed. Moreover, even in Swiss political life, if we may judge from actual developements, it is doubtful whether the cautions and restrictions which it was originally intended to impose upon the use of a Referendum can be relied upon as stable, now that the principle is put thoroughly in practice of a legislative vote by an Electorate at large. To the difference of opinion among national writers themselves where the Referendum is in use I have already called attention.

In England the Referendum has not been adopted, and

[183] See Bryce[3], i. pp. 472, 473. The main argument in favour, here, of the Referendum and Initiative appears to be the hopelessness of improving the State legislatures, ib. p. 474.

[184] See Lowell, ii. 295—300.

the few words which may be added here are merely surmise as to the purposes for which a reference to our Electorate would *probably* be employed. It has been rather specially invoked, by one of its ablest advocates, Professor Dicey, as against extension of the franchise to women, should such a measure be passed by Parliament. This is to use the Referendum as a simple Veto: nor, possibly might it ever proceed here, as it has in Switzerland, to the developement of a popular initiative, although it is by no means certain that such references, once adopted, are ultimately so confinable. Their more frequent use here would, I should have predicted, have been in settlement of differences between Lords and Commons, while the former still retained an independent share of legislative power. Such a settlement is for the present unnecessary; but those who hold that a reformed House of Lords ought to have some such power, may hope that the present is merely a state of transition. And all who entertain that hope will, I think, naturally prefer the system of amendments and compromises, in which the good sense and moderation, even of the unreformed Houses, worked indifferently well[185], to the somewhat crude judgement of a popular vote. This undoubtedly opens up a wider question, whether "the people" in the usual sense, *should* be omnipotent, which will be discussed in the latter part of this section. But, before leaving the Referendum, we must return for a moment to the question of *convenience* or feasibility mentioned above (p. 267).

Allowing, for the sake of argument, that the Electorate to the popular Chamber is, or should be, the ultimate authority, we must now ask the question how far this *political* Sovereignty can be made *real*. The question is evidently not a mere academic one, nor, on the other hand,

[185] See Hearn's description of the working of what is now the *old* system (Government of England, pp. 176—178).

can it quite be said *solvitur ambulando* by the present instances.

Obviously, two of the leading functions usually combined under the head of Sovereignty—the Judicative and the Executive—cannot, in the nature of things, be exercised, in any of our larger modern States, by an Electorate. For the third function, legislation, to which the other two must on the whole be regarded as subordinate, most modern Electorates are, no doubt, within the limits of mere possibility, competent. Under the general facilities for registering individual votes, an Electorate can be truly regarded, in Austinian phraseology, as a *determinate* body (above, p. 59), capable of corporate action and therefore of imperative Law making.

In England no such latter capacity has as yet been either exercised or recognised. The "political Sovereignty" which is, according to Austin, shared with the other members of our Parliament by the Electorate, but, according to Dicey, really belongs to the latter alone, is only in a condition of latent or very imperfectly potential activity. All it can do here is to impress its will upon the "patent" or "legal" Sovereign, on occasions of election, when certain particular objects have been pretty definitely prescribed by the returning majorities in general. And, after all, strict obedience to such alleged "mandates" is not yet in accordance with the generally accepted view of a Representative's public duty. Their only practical sanction—no doubt a strong one—lies in the risk, or aggregate risks, of future non-election[186].

The effect of the Referendum, apart from the Initiative, is generally regarded as Conservative, or that of a Veto.

[186] Dicey, however, endeavours to shew that, in English political practice, the *latent* Sovereign can express its will "more speedily" upon the *patent* one than in either the Swiss Confederation or the United States. Dicey[7], p. 71.

But this is not to be depended upon, in the case of an aggressive organisation, e.g. of the Labour Party. The small percentage of available votes cast has been frequently remarked, and indolence or carelessness might tend to reduce it still further in case of frequent use. Even with the thoughtful and serious citizen the difficulty of a simple Aye or No remains. The possibility of the voter getting an alternative more to his mind has been offered on some Licensing Acts in New Zealand and Education Acts in Victoria: but this cannot, under the necessarily simple conditions of universal voting, be carried very far. Where the tendency again is, as is the more usual, to decide a plain issue of Yes or No by a bare majority, the Referendum is, of course, open to the usual objection, on which the demand for proportional representation is based.

Is the real feeling or wish of the popular Sovereign expressed by a bare majority; and is there any security that the requisition of a three-fourths or higher majority may not be reduced at will by popular legislation, once recognised? Finally, to pass from the reality of expression of popular will, to the effect upon any system of Representation still retained, there is to be considered the danger of lessening the feeling of responsibility and the capacity of judgement, in the Representative proper, by removing the decision on any difficult or important matter to another tribunal.

M. Borgeaud, one of the strongest champions of the Referendum, speaks, in his "Adoption and Amendment of Constitutions in Europe and America" (translated), much more favourably of its reception, at least in the States of the latter (i.e. the individual members of the United States), than either Bryce or Lowell (ch. 12): in Switzerland, naturally, in still more favourable terms (ch. 4 and conclusion). The way, however, in which the machinery of the Initiative may be worked (e.g. in Zürich, p. 326) does not

appear to commend itself to personal observers. The same author admits that "direct consultation of the people" is temporarily out of favour in France, but only in consequence of the recent use of the *plébiscite* for Imperial purposes.

There are some useful remarks on the use of the Referendum and Initiative in America by Professor Stimson in his Popular Law Making[187]. And the objections to their introduction, at least in England, are ably put by Dr M'Kechnie, of Glasgow, in ch. 7 of his "Reform of the House of Lords."

Are "the People" to be the ultimate Sovereign? Beyond all these questions, of juristic theory or practical detail, there is this last one. Is it too late to ask whether the popular branch in a bicameral legislature—"the People," in the usual phrase, is really, or ought to be, under present circumstances, the ultimate Supreme Power? It is a question surely not to be answered offhand, by declamation, as one of natural right, or by deductive reasoning from a theory of Sovereignty which is only one among others; but requiring a candid consideration of individual Electorates, free alike from the flattery administered by demagogues to the Many and from the resentment, aroused by what they consider unjust attacks, among the comparatively Few.

The modern Electorate is sometimes likened to the old popular or national assembly of freemen: but there are enough important points of difference to render the comparison of little value for precedent or example. On the one hand, the Aye or No of an Electorate can certainly be more truly determined, as far as numerical majority goes, with an arithmetical exactness, and can be endowed with a definite legislative power, unknown to our Teutonic or Scandinavian

[187] Pp. 294, 295. See too a valuable note on the Referendum in our Dominions by Keith, pp. 930—938. It is not, on the whole, particularly favourable.

ancestors. On the other hand, it may be seriously questioned whether the great part of our modern voters have either the liberty of individual opinion or the truly public spirit of the ancient freeman. The very frequent existence also, by the side of the latter, of a voiceless servile class, has many consequences which rendered his position very different from that of his modern European successor.

It is not my intention to enter into detail as to the different qualifications and groupings of electors to the popular assembly which exist in our modern states. Varying property and residential qualifications; differences in value of votes arising from unequal number in electoral districts; an occasional multiple vote given by qualification in more than one district; these may exist, and for some time continue to exist. But the present state of things tends, certainly with ourselves, towards the principles of one man one vote, such redistribution as will reduce all votes to an equal value, and the requisition of little or no qualification beyond the attainment of years of discretion. The great question of sex I shall not discuss here. Although it receives strong and intelligent support, the feeling of a decided majority among males seems to be against the enfranchisement of women: nor do I think that this is so much the question for the present generation as that stated on the preceding page.

The three principles suggested above, reinforced by ballot and bribery laws, ignore any efficient force in the distinction, which would seem to have been contemplated by Austin, when he speaks of the bulk of the *influential* members of the community[188]. They give, and are frankly intended to give, to the man of smallest means and most limited

[188] Austin[5], 6. 266. It is true, he is speaking of public *Opinion* on Constitutional Law (or Convention), and had in view a very different English Electorate from the present one. But *we* have to take into account the present as well as the past state of things.

experience, equal power, in appointing his particular part of the sovereign body (under the Referendum, in legislating), with the wealthiest and wisest. Now the diffusion of knowledge and political education varies, from many causes, in different countries, though it is probably true that voting power, when exercised, does stimulate the intelligence and produce a certain average comprehension of political situations. But, whether this goes much beyond self-interest—whether the poorer, who will always be the more numerous, have enough obvious stake in the present order, as a whole, to foresee danger from reckless legislation, is an obvious question; faced, apparently, with perfect confidence by those who are ready to reduce the franchise qualification to the lowest minimum or none at all. Rather, perhaps, the franchise is regarded, by such, as one of the vague "natural rights" belonging to Man *quâ* Man—the *sole* enjoyment of which, by the way, is beginning to be inconveniently challenged by Woman. There is also to be taken into account the considerable number of persons by whom an entire reconstruction of our present social system upon a communistic basis is contemplated. With those who honestly and definitely look forward to this end, I cannot argue in any hope of success. But to the minds of others, who waver in this direction, I would recommend the perusal of such works as Mr Stewart Grahame's "Where Socialism failed," and the picturing to themselves the intermediate stages which *must* occur before the realisation of any such reconstruction in general is effected.

The current objections to a practically universal franchise for *election* to the legislating power, which are here expressed or implied, may obviously be urged with still greater force against conferring such power directly upon the *electorate* itself. I must now, however, pass to certain more particular results, upon the popular branch of a bicameral

Legislature, which may be anticipated from present social conditions.

Predominance of "the poor" through direct taxation. If the poor may be assumed likely still to outnumber the rich, the popular Chamber, under the conditions to which we seem tending—one man one vote, one vote one value, and adult suffrage—must become rather specially the representative of the former. Not that it is either just or rational to regard the poor, simply from the circumstance of poverty, as a purely self-regarding class, or really as a class at all, that is as necessarily consisting of uniform or homogeneous voters. But there are in our time other influences than poverty which tend to make them so. Direct taxation, as it has been applied in England, and is beginning to be applied elsewhere, is a main one. The exemptions, which used once to be grounded more on difficulty and expense in collection than on scantiness of means, are now based avowedly and exclusively on the latter ground. And this differential treatment, reasonable enough at first sight, easily mounts upwards, through diminishing allowances to increasing burdens, till we reach what will assuredly be felt as an arbitrary and ever-threatening injustice by those upon whom the higher grades of taxation fall—a feeling not diminished by the contemptuous disregard which there will usually be found popular orators to express and excitable audiences to echo. It is, however, the total exemption, rather than the differential treatment, which most obviously tends to weld the poorer English voters into a homogeneous class of non-Income Tax payers; and, through their Representatives, to throw increasing national charges exclusively upon the remaining and minor part of the body politic. This is considered, I admit, by many humane and thoughtful people, *desirable*, in our present state of society, where there are undoubtedly extremes of waste and distress, obviously unequal opportunities,

and what perhaps tends more than anything else to produce discontent or indignation among the poorer class, freakish extravagance and vulgar ostentation. These evils can never be entirely eliminated, while differences of ability, energy and providence exist, unless we go very much farther in the direction of limiting bequest and inheritance than any rational political thinker has ventured to suggest. They can, however, be largely diminished; partly in the way of legislation, much more, I believe, in that of private action. The indirect taxation of luxuries, a term to which a wide rather than a restricted application might reasonably be given, is not merely efficient as productive of revenue: it aids to produce what I should myself regard as an equally beneficial result—the adoption of a simpler mode of living. In respect of such indispensable necessaries as better housing and sanitary appliances (indispensable for the health of all, as much as for the well-being of the poor) it would seem that private enterprise must necessarily be reinforced with public assistance: the means already exist if they are only applied. The extension of opportunities, particularly in the way of higher education, is already widely exercised, in cases where there is a reasonable probability of available use: where there is not, the effect is merely to create an unsatisfiable longing. Under all and through all is the obviously increasing habit of consideration and courtesy shewn to inferiors in fortune. Meanwhile, to regard the capitalist (under which name must be included the humblest investor of savings) as an enemy of society, or to assume that the self-appointed champions of Labour have a monopoly of zeal for the general good, is contrary to the most obvious results of reason and experience.

On the idea of ultimately equalising fortunes by compulsory means of direct taxation or "resumption of the means of production," I may add a few words to what has been said above.

The simple view that "those should be made to pay who can afford to pay" is often coupled with another discrimination in taxation, in the *character* of the property. Here, I do not wish to anticipate what must be said hereafter about the *dominium eminens* of a State and the rightness, or advisability, of occasional exceptional treatment of certain classes of property, more particularly in newly-settled countries. Nor do I absolutely deny the justification of differential direct taxation, as an occasional and temporary expedient in cases of peculiar and immediate urgency: at such "benevolences" even the higher contributaries would probably grumble very little. But the principle of discrimination, either in denomination or in amount of property, employed as a regular method of taxation, must be regarded as grossly unjust by a large minority of "subjects," and must lead to all the bad effects that spring from a feeling of injustice—falsehood, evasion, transfer of capital, where possible, abroad, and class animosity at home. Utopian as it may seem at present, I still believe in the justice and wisdom of making Income Tax payable, *pro rata*, by every single voter, without either distinction or allowance, down to a low minimum, and on an assumed yearly value below that minimum. Until which principle be established, it is submitted that a double vote ought to be given to every Income Tax payer.

Any such proposal as this will be inevitably assailed by somewhat conflicting objections. On the one hand, that it is either a "disfranchising measure," or adds unduly to the burdens of the poor, who already contribute more than enough in the way of indirect taxation: on the other, that it would lead to the return of economists at any cost, who would starve needful outlay, particularly on national defence. I admit that such a measure *would* confine, and be intended to confine, the appointment of managers of their country's revenue, to those who contribute, and feel that they

contribute, directly to that revenue. I do not admit that any other person is entitled to a voice in the matter; and I do not believe that any want of patriotism is to be apprehended from those who voluntarily assume this charge: for, below the minimum, it *should* be voluntary. And, as to adding to the burdens of the poor, I hold that a first charge upon the increased revenue, which may be expected, should be the entire release of indispensable necessaries from taxation, and the liberal use of State aid in the provision of sanitary house room for the labourer, which apparently can*not* be provided, on commercial principles, by private enterprise. All this might quite possibly raise the rate per pound of Income Tax, to which no wellwisher of his country would object, so long as it were justly and equally imposed. But I suppose the present system, of bribing the poor with the money of their neighbours, will go on until either demagogy begins, as Juvenal says, *Cerdonibus esse timendum*[189]; or a statesman arises strong enough and bold enough to scorn competition for the votes of the poor Many by unjust taxation or adroit cajolery.

The Labour Party. With the tendency of differential direct taxation, to crystallise the poorer voters into a class, must also be taken into account the modern formation, very widely spread, of a Labour Party. There is no question here about the right and power of Trades Unions, in the way of "collective bargaining" with employers in individual Trades. Such combinations have been practically recognised by legislation as justifiable and beneficial. It is the larger association called Syndicalism which constitutes a great and increasing menace to the well-being of the Community at large—in the shape of the sympathetic general strike, the crowds of hungry men, and the professional Labour leader with the power which he so arbitrarily wields. While I write, this tyranny has been

[189] Satt. 4. 154.

producing compulsory idleness and untold distress, without apparently getting much nearer to its proposed objects.

A recent very striking instance of the exploitation of the working man was given us in the rejection of the late Lord Furness' Hartlepool scheme of Copartnery between employers and employed—a method which would seem to me to afford the best hope of obviating the ruinous alternation, so frequent, of strikes and lockouts[190]. But "all such schemes," said Mr Keir Hardie, "were opposed to the solidarity of the working-class movement." And the fact, said Mr Barnes, that "the men would have come to regard their position at the works as secure, and thus lose touch with their fellows" must outweigh any success of the scheme. Such schemes have their obvious difficulties both for employer and employed, and other reasons were also given for the unfavourable vote cast in the particular instance; but there can be no doubt that it largely resulted from the powerful influence exercised by the chiefs and organisers of the Labour Party, as distinguished from direct representatives of an individual trade.

Not the least important effect of this influence is its exercise upon the particular functions of Election and Representation. In spite of the nominal security given to the voter by the ballot, the vote of any man who, from whatever circumstance, depends a good deal upon the opinion of his club or immediate neighbourhood, is generally pretty well known, and, in many cases, practically dictated. As to Representation, there will, I trust, always be, as there are now, some Members of Parliament, returned mainly by operatives, who yet preserve their independence unimpaired;

[190] I do not venture to prescribe this as a universal method of bettering the relation between employers and employed. But I cannot help thinking that both the selfishness attributed to the former and the incredulity or ignorance attributed to the latter are very unduly exaggerated as obstacles.

who truly consider and pursue the good of the country as a whole. But no one can read either the discussions and resolutions of Labour assemblies, or the addresses of candidates, Conservative as well as Liberal, to general meetings, in the England of to-day, without seeing the prevalent tendency, often ostensibly professed, to give a distinct predominance to the class interests of Labour. That there was a time when these interests were unjustly neglected no one will now-a-days deny: but to compensate that past injustice by a present one, inflicted upon the rest of the community, savours rather of Oriental notions as to divine Providence than of a civilised regard for the general good. It is not here contended that the objects of a Labour party are necessarily Socialistic, in the sense of aiming at a compulsory equalisation of economical conditions, by graduated taxation, or the nationalisation of means of production and distribution. But it is contended that those objects are often narrow and unpatriotic, as being avowedly confined to class advantages; and that, even when based on a theoretical philanthropy or patriotism, they have generally to be carried out by measures which, for the time, do prominently disregard the interests of other classes in the community.

Again, it is perfectly clear, from avowal among the Labour organisations themselves, that the Labour candidate is more particularly (see above, pp. 235, 236) understood to be pledged to certain definite and stereotyped political aims, by engagements entered into beforehand with the constituents and backers upon whom he is often pecuniarily dependent. The immediate sanction of withholding supplies may for the time be frustrated by State payment of members; but that of losing the position altogether, on a future occasion, remains. In many cases, therefore, it is to be feared that the Labour member may be in truth a mere delegate, the terms of his delegation being fixed by wire-

pullers or organisers. These are, no doubt, objections applying, in some degree, to the Party system at large, but particularly to a needy man.

The result of this general solidarity, among a class which must always be a numerical majority, and particularly of this organisation for special class interests, is that the "Labour Vote" tends to become, before very long, a predominant power, not only in the English House of Commons but in the popular legislative assembly everywhere. This is a state of things already looked upon with apprehension in our own daughter Commonwealths. A coalition of other parties against Labour was recently attempted, for instance, in Australia, by a very able and farsighted Minister; but failed. I may remark, by the way, that the Labour Vote in that Commonwealth is considered, by competent observers, to have been materially increased by the admission of women generally to an adult franchise[191]: against which many would, in England, give their vote, who, like myself, have gladly supported female franchise on a property qualification.

It may be that the territorial and social conditions of a new country, as has been suggested above (p. 281) do for a time excuse, or even justify, measures resulting from a Labour predominance, which would be both unjust and inexpedient in England and in other old established legal systems. I should instance particularly any radical interference, often supported by very vague theory, with estates and dealings in *land* which has for centuries been an article of purchase and investment like other property. We must not moreover forget that, in many of such exceptional conditions as above contemplated, a *written* Constitution, as interpreted by an experienced High Court, provides somewhat of a breakwater against extreme industrial or socialistic legislation, which we,

[191] Compare Constitution Act, §§ 30, 128 and No. 8 of 1902.

with our omnipotent English Parliament, do not possess. The decision of the High Court of Australia, on the so-called "Harvester Cases," that what purported to be a taxing Act was really a "regulation of industry" and "unconstitutional," is directly in point[192].

In the case of England, the danger of class legislation has been perceived by a sufficiently democratic observer—Professor Lowell[193]—and has come nearer than when he wrote: although even then the Trades Disputes Act, of which he admits the injustice and impolicy, had already been passed. The influence on the two old camps—Conservative and Liberal—of their "more moderate elements," in which he sees a corrective, has been of late, at least to those outside the Party game, somewhat conspicuous by its absence. To such observers, a new cleavage of Parties, which is widening every day, seems to require recognition, whether we choose to call it Labour and Capital or Labour and other Interests. And, accordingly, a new theory of Political Sovereignty, or rather the revival of an old one, may be required to meet the case.

The State as an Organism. A Political Association, in the point of view here suggested, is to be looked upon, not simply as an aggregate of individuals, but as an organic body, with different limbs, none of which can be set at nought, starved, or blighted out of its necessary vitality, without grave detriment to the whole. It is in this organic body, rather than in any determinate number of electors or voters, that the very able recent exponent of Austin, Professor Brown, then of Adelaide, considered the ultimate or Political Sovereignty of England really to reside[194]. Vague as this

[192] See Commonwealth of Australia *v.* M'Kay, 6. Commonwealth Law Reports, High Court of Australia, p. 41.

[193] Governments and Parties, ii. 534.

[194] Brown, pp. 115, 283, 284. Laband writes somewhat to the same effect on the German Polity. The views of *individual* developement (see above,

conception may at first sight appear, it not only depends, to my mind, upon a deeper and truer principle than that of counting heads, but it seems capable of distinct practical application in our present political crisis. There are in any complicated modern society many other unities of interest or common feeling which are regarded, not only by themselves but by most educated men, as equally deserving of recognition with that of Labour. The latter is apparently at present on the way to predominate in the more popular legislative Assembly and its Electorate. Consequently, under the Dual Party system, which is at present prevalent, there will always be found leaders ready—at any rate so their antagonists will say and feel—to bid for the popular vote by the sacrifice of any interest representing only a minority or "class." The motive may be the base one above suggested, pure and simple: it may be largely mingled with a wish to redress the inequalities of fortune by legislative interference: it may amount to a scheme for entirely recasting human society by communising, with or without compensation, certain kinds of property, and ultimately abolishing private property altogether. The suffering of the victimised minority will be, in any case, the same; as will be the burning indignation aroused by injustice, particularly if accompanied with an ostentatious disregard of the rights and feelings of those who have in the meantime to pay the piper while others practically call the tune. Can anything, for instance, be conceived more unreasonable than that our Upper House is to have no voice in disposing of the monies to which it so largely contributes, on historical grounds that have long since entirely ceased to exist (see above, n. 71, p. 209)?

Is it to be expected, however, that a minority of any

p. 263) in Professor Brown's *later* book do not appear to me to militate against his earlier conclusions as to the State. See ch. 4 of The Underlying Principles of Modern Legislation.

importance, constituted by persons of property, energy and ability will quietly submit to be "taxed out of existence" or "bled white," as the elegant phrase of to-day runs? The present state of Society may come to be entirely recast, but it is not likely that the change will be effected without something very nearly approaching to anarchy or civil war. If such calamities are to be avoided, the "classes," to quote another, and most mischievous, phrase, must, as it seems to many of us, obtain or retain a definitely independent hearing and recognition by the side of the "masses." This object might be best attained, according to some observers, by providing modes of proportional representation in a First or perhaps a Single Chamber, which will facilitate self-grouped constituencies; according to others, by making the Second Chamber an independent representative body, rather than a mere machinery for securing deliberation.

The latter is the view here adopted, as being not only much simpler but also more in accordance with the old Constitution from which we have but recently diverged. It is therefore of **a reconstituted House of Lords** that I have, in these last pages, to speak.

The voice of general experience, and certainly of most individuals possessing any knowledge either of contemporary politics or history, is decidedly against a Single Chamber Parliament, however it might be improved by schemes of proportional representation: and any degree of reduction of our Second Chamber to the bare function of giving a little time for reflection to the first, is an approximation to Single Chamber government. I venture therefore to maintain that what the present crisis demands is a reconstituted House of Lords, which, while abandoning the purely hereditary legislative principle, or entirely subordinating it to that of personal qualification, should stand on equal terms with the so-called Lower House, but be primarily though not exclusively

representative of other classes or interests than that of Labour, which I assume will continue to have rather the predominant influence in a House of Commons.

It has been, and will no doubt be, found very easy to criticise and ridicule the first suggestions at such a Representation of the different interests, besides Labour, that do certainly go to make up a body politic, in this suggested Second Chamber; from which it is by no means intended to exclude a minor proportion of Representatives and spokesmen for Labour itself. More worthy of a Statesman's powers would it be to face the questions before us and endeavour to settle them by common action, instead of playing the mere battledore and shuttlecock game of Party, with which most thinking Englishmen are heartily disgusted. If such a Representation, as suggested, is thought desirable, the methods for attaining it ought not to be impossible to good will.

It is, to begin with, both desirable and in accordance with long practice, to retain the advantages of birth and breeding, through the election of a limited number of Lords of Parliament by and from the body of hereditary Peers, that body being recruited from time to time by a limited power of appointment, made just as now, but *really* for distinction. It should not be difficult on the other hand, to furnish spokesmen and voters for the industrial amongst the other classes, by an equal number of such Lords, taken from the nation at large, whose election might be fairly entrusted to the House of Commons. I cannot see from the instances before us that there appears to be any necessary or *intrinsic* objection to an election by elected persons (see however below, note 195). Whether present or past tenure of high office, in Church or State, should *ipso facto* entitle to a seat, is a matter of question. Such a qualification should, if allowed at all, be allowed but sparingly.

The suggestions here submitted are made very deferentially and in the rough, but with the definite view, consistently with their one main object, of disturbing as little as possible, and utilising as much as possible, our existing machinery. That object (see above, p. 288) is to secure, in the Upper House, an efficient Representation of classes who now run the risk of being very inadequately represented in the Lower; besides the advantages of deliberation and revision. For the latter purpose, greater age and length of tenure have generally been recognised to be important in a Second Chamber, as guaranteeing a higher degree of experience and stability. In my own view, the tenure of a Parliamentary Lordship ought universally to be for life. In this respect any difference between various classes of Lords would be extremely invidious both to the elected and the electors. Normal life tenure is, however, not inconsistent with the common business principle that a seat should be automatically forfeited or suspended by any approach to systematic non-attendance.

It will no doubt be objected that any setting up of an independent Second Chamber will mean a standing and organised warfare with the First. I would ask, however, whether it is not more reasonable to hope for a mutual good understanding from the frank recognition of interests, which certainly exist besides Labour, and are equally necessary in the economy of a State, than from the present vague and unsatisfactory principle of the Sovereignty of the People. A Constitution, which definitely admitted some such co-ordination of two elective assemblies as is here suggested, could surely find means, with our favourite English method of compromise, to overcome the dreaded "deadlock." I have indicated above (p. 269) my own preference as to the machinery for securing agreement. A small joint committee of sensible men would certainly appear a more hopeful means

of reconciling differences than a cast-iron rule by which one body must absolutely and necessarily yield to the other[195]. Of the evil and foolish practice of *swamping* we have, I trust, heard the last in England; even temporary irreconcileability, and consequent non-action, might be better than this last resource, straining the Prerogative, as it must, by a use, one would suppose, equally distasteful to the Premier who should suggest and the King who should carry it out[196].

[195] Compare, in disputes between masters and men, the incalculable advantage, both to themselves and the rest of the community, of Conferences and Conciliation Boards, over the bull-dog "fight to a finish."

[196] To the somewhat conflicting lessons from the experience of America and France (above, pp. 215, 219), as to the indirect election of Senators, should be added the fact that the same principle is also adopted by the Prussian Constitution as to election of Deputies (*Abgeordneten*) in the *Lower* House, which has been called "a compromise between universal suffrage and property qualification" (Lowell, i. 304). For details I must refer to the author just quoted. The result is stated by him to be, as in America, that the ultimate Electors do not really select the Representative, but are themselves almost always voted for in the name of a definite candidate, whom they are pledged to support (ib. p. 308). This is no doubt necessarily the case whenever the ultimate Elector has no other function than the election. It does not so obviously follow with members of the English House of Commons or of the Electoral Colleges of France.

§ 5. JUS AND LEX

ADMINISTRATION of justice before early assemblies, pp. 292—294. Meaning of early names for law, 294—296. Fas and Jus, 297—300. Jus differentiated into Law, 300, 301. Lex, the Statute or Ordinance, 301—303. Lex, the declaration or reading, 303—305. Regiae leges, 305—307. Lex curiata, 308. Lex publica and Lex mancipi, 308, 309. Legere and jus scriptum, 309—311.

I have already (§ 3, p. 103, § 4, p. 166) pointed out, in general terms, how the basis of Original Law may be found in Popular Morality; Morality being used in the ordinary sense of the word, and the developement of such Law being due to a primeval Administration of Justice. The Origin of Early States was investigated at considerable length in the first draft of these chapters, but was found to be better suited for an Appendix to the historical part of the present work. A part of the results of that investigation may however be given here.

In many ancient nationalities, and not least in those belonging to our Aryan branch or family of mankind, there is abundant evidence in traditional history or poetic story of early popular gatherings, scarcely to be called assemblies, with Judges or Elders delivering, for individual cases, what must have been, in accordance with the feeling of those assembled, *right, fitting* or *proper*, as the decisions in question evidently depended on the support of what may be called the *nascent community* at large.

This expression, the nascent community, is meant distinctly to indicate that the fully developed Austinian State, with its general obedience to a Sovereign must often be

recognised as following rather than preceding an administration of justice, and the possible formulation of rules of conduct for a looser association of human beings. *Rules*, because, although each pronouncement most probably purported to be nothing more than an isolated decision, yet wherever there was, as at Rome and elsewhere, any considerable permanence of a judicial, or half-judicial, half-priestly office, we have the almost certain result of some reduction of the principles acted on to general statements, not necessarily published but recorded and transmitted. And it seems to me that rules, thus differentiated from the general mass of what is felt to be right, fitting or proper by the gathering or assembly, might be truly styled inchoate Law, although the assembly cannot be called a "determinate body," although there is as yet no Sovereign, and the Judge has certainly no idea of obliquely legislating by any individual decision.

On the probably later developement of full Austinian Sovereignty in the case more particularly interesting for the present work—that of the Roman *Rex* from the *Pontifex*—what detailed evidence can be suggested will be given in a later volume. Had the Tarquinian dynasty lasted longer we might have been faced with the phaenomenon of a developement of Austinian Law, not obviously in accordance with the interests or feelings of the mass of the community but rather made in the interest of the Sovereign, as was certainly the case with some of our own Anglo-Norman judicial legislation. As it was, we have to record, under the comparatively limited power of the King's consular successors, a continuing *professional* developement of Law (*jus civile*), of which the opposition, in some points, to popular use, good or approval, is due merely to an early distinction of orders or classes and disappears with it. See below, § 8, p. 409.

What however I wish at present to take into account is the evidence to be found for an original reference to Popular

Morality in some of the earliest names for Law in general, with special reference to the case of Rome; and, at the same time, to note the introduction of designations, indicating conscious legislation, in what I believe to be a later stage.

Meaning of early names for Law. The value of this evidence may no doubt have been over-estimated in the past, but is at present sometimes unduly depreciated. Among the scanty materials which we have for the history of original law and judicial institutions, much of what is complacently accepted in preference will be found to depend either upon what is virtually *a priori* reasoning, or upon scattered analogies so conflicting that they will prove anything, and at any rate must defy any profitable generalisation. Such at least is the impression left on my own mind even by some parts of so admirable a work as Dr Westermarck's Origin and Developement of Moral Ideas, in which he somewhat contemptuously deprecates the "philological method[1]." I still venture to think that the most trustworthy ground of belief, as to the original character and basis of a people's Law, lies in the internal evidence of the oldest words employed by that people to designate Law, if we can make out their first meaning. Deliberate coining of words and framing of philosophic theories are equally foreign to really ancient times; so that the names of which I speak, with whatever successive changes of meaning we can trace, may be fairly taken as unconscious definitions modified by practical experience. And, while, on several of the most interesting cases, Comparative Philology cannot yet give a positive reply, she can certainly often furnish us with negative results sufficient to

[1] Westermarck, i. 133, n. 3. Much more philosophical is Professor Salmond's view of the same subject, though in his treatment of Jurisprudence it only comes in an Appendix, ed.[2] pp. 463—473. A more prominent position is at least allowable in a work which, as primarily historical, deals more specially with the *developement* of Law.

dispose for good of previous erroneous theories. I have to some extent elsewhere[2] investigated and compared the early names for Law, and the oldest traditions or memorials of legal practice, in Roman, Greek and some Teutonic languages, with the following results. The nearest approximation to a uniform or pervading idea of early Law, in these cases, is not so much that of *enactment, position* or *command* as of *antiquity, regularity* and *usage*. Whatever the Roman *Jus*, for instance, was, it was certainly not "that which is commanded." Indeed the favourite old definition "*jus, id quod jussum est*" does not seem to have recommended itself much to Austin himself, who so emphatically based Law upon Command.

In Greek, the earliest words that we can find approximating to the notion of Law indicate, it is true, something *appointed* or *ordained*. But the appointment is undoubtedly conceived as *divine*, so that the fundamental idea of the group of words, to which I refer, seems at least to negative any notion of specific human legislation. The same remark will apply to the more doubtful derivation of *Fas*. Since, therefore, we do not in these cases admit a direct revelation, we may fairly consider *θέμις*, *Fas* etc. as pointing to rules of conduct not imposed, but evolved out of the general religious feeling of some human society. In the English language the very word Law meant originally that which *lies* or *rests* rather than that which has been *laid* or *set*[3].

[2] P. J. i. chaps. 2—6. For an exhaustive recent treatment of the same subject, mainly with a view to Greek language and feeling, see Hirzel's *Themis, Dike und Verwandtes* (1907).

[3] I have left standing the conclusions at which I had arrived in 1883, and to which in the main I still adhere. It should be added, however, that Hirzel, accepting the derivation and explanation of *fas* as the utterance of God's will (p. 51), denies any original connexion of *θέμις* with a necessarily divine institution (p. 43). With him the original meaning of *θέμις* is simply *counsel*, from which are derived the meanings (in *ἥ θέμις ἐστίν, οὐ θέμις ἐστίν*

There are of course many well-known names of Law, in Greek, Latin and English, in which the idea is clearly from the outset that of enactment; but they are of later formation than the primeval words above considered, and they moreover mostly express particular sources or modes of Law rather than Law in general. The Latin *Lex*, which has so large a progeny in the Romance languages, belongs to this later class.

The tenor of documents quoted to us as actual enactments dating from the earliest times, whether attributed to evidently fictitious or probably historical legislation, bears out the conclusion above drawn from etymology. Sometimes, as in the Anglo-Saxon "*dooms*," they are avowedly memoranda for judges carrying out rules already known and accepted. And in all the oldest cases which have come under my knowledge, such documents, whether remaining as judicial notes or published as ordinances, do not define or lay down anything,

&c.) of *allowable*, *seemly* (pp. 48, 49) and in Il. 2. 73 *advisable* (p. 42). While one would gladly accept the moral meaning of *suasion* and *impulse*, I must maintain that the passages quoted from Hesychius and the *θέμωσε* of Od. 9. 485, 543 (Hirzel, p. 54) do not seem to me sufficient to substitute an unheard-of root *θεμ-* for the more generally accepted connexion with the *θε-* of *τίθημι*, &c. In *δίκη* Hirzel agrees with the view at which I myself very reluctantly arrived (P. J. p. 51), in rejecting an original meaning of *way* or *custom*, and maintaining that of *judgement*, which however he derives rather strangely from a physical extending of the judge's staff or sceptre (*δικεῖν*) rather than from the root of *δεικνύναι* (pp. 95, 97). *Νόμος is*, according to him, a *way* of life or conduct (pp. 366, 367). *Custom*, becoming ruler or tyrant, thus developes, he holds, into the meaning of Law (pp. 380, 381). The difficulty of reconciling this original signification (of Custom) with a direct derivation from *νέμειν* (P. J. p. 57) does not seem to me to be got over by Hirzel (p. 366, n. 3) still less by Jhering, Geist, i. 218. In the slight amount of reference here possible I cannot do full justice to Hirzel's work, which may well be the last word on the subject in point of authorities and materials, if not always of conclusions: but I think I may claim him on the whole as a supporter of the view that Law originates in Custom or at least Judicial decision rather than in Legislation. On the Anglo-Saxon *lagu ae domas*, &c., see below, § 8, pp. 384, 385.

but assume existing principles and apply them to different classes of case.

Fas and Jus. Assuming the existence amongst the Romans, as in most other nationalities, of some general form of Moral Judgement, such as we English indicate by the terms Right and Wrong, I pass now to a more particular consideration of two very elementary terms under which that judgement appears in their language. *Fas* and *jus* both, it would seem, represent the general idea of Right, but the former also that of Right specifically in the sight and as the concern of Heaven. The name has been connected by a number of respectable authorities with words expressive of *speech*, and explained to mean the *word*, or command, as θέμις the ordinance, of God[4]. This explanation comes, to my mind, rather too readily from Biblical phraseology to be entirely satisfying. But, however the words are to be derived or originally explained, as to the general meaning, in use, of *fas* and its negative *nefas* there is no doubt.

The amount of religious feeling or motive expressly entering into our earliest specimens of Law varies materially in different national systems—possibly in consequence of the different stages of developement at which we catch our first sight of the particular system. Some very ancient rules of conduct appear to base their claim to obedience purely upon considerations belonging to another world; some appeal to the consequences, here on earth, of approval or disapproval on the part of superior powers or deceased ancestors; occasionally all reference to supernatural authority or obligation seems to be wanting[5]. I am disposed to think that the third is the *latest* state of things; and that the displeasure of

[4] See Hirzel in n. 3; Leist, Graeco-Ital. Rechtsgesch. p. 236; Corssen, Auss. 2^2. 685 and Beit. p. 197; Jhering, Geist, i. 266.

[5] See Maine, Early Law and Custom, pp. 37, 38, 59, 72; Village Communities, pp. 67, &c.

heaven incurred by transgression furnishes one of the chief motives for obedience to the earlier rules of conduct, which are recognised as to be generally obeyed. The reinforcement or accumulated effect of such motives, arising from the feeling or interest of the nascent community at large, is an obvious supplement to the individual conscience, if I may be allowed to use that old fashioned term.

So, in the Roman administration of justice, offences against heaven were apparently among the earliest subjects of formulated rules. We have fairly sufficient data enabling us to describe the enforcement of these rules, and to shew how the old Roman Criminal Law is, in its origin, probably derived from, or modelled on them. *Fas* and *jus* are sometimes treated, mainly I think by moderns, as continuing to constitute one of the many more or less clearly marked *dichotomous* divisions of Roman Law. To some extent this is true. Religious ceremonial, and the traces of deference to ancient religious feeling still retained in lay matters, were no doubt, in later times, the special province of *fas*. *Fas* would also seem, historically, to have included considerable magisterial powers of the higher officers of religion over the lower, and to have governed the formalities, for they are little more, of Roman International Law. But, outside this special and limited province, *fas* appears to me to have only entered, into Roman Law general, at an early and evanescent stage of the Criminal branch.

On *jus* as distinguished, in meaning, from *fas* I agree with Jhering[6] that the former is Right as a matter of human institution—I would rather say recognition—and the latter Right as matter of divine revelation or approval. The two, however, run much into one another in very early history. It seems to result from a gradual developement of the secular, out of the sacerdotal, power at Rome, that the one was

[6] Geist, i. 267.

ultimately left to be enforced, outside the circle of religious officers, by religious or social sanctions alone, the other being of course maintained and enforced by the collective power of the community.

The derivational meaning of *jus* remains an unsolved etymological problem. It is not *command*, *jussum* being rather derived from it than it from *jussum*. Nor can Jhering's view be admitted that *jus* is a *bond*, depending on a common agreement of the people[7]. The idea expressed in these last words is an anachronism, belonging to a time of conscious jurisprudence far later than the *judex* of Tarquin's *perduellio* or the *jus esto* of the Twelve Tables. Moreover the interpretation of the word itself, as "that which *binds*," is not easily reconcileable either with the general meaning of the root *ju*, or with old idiomatic uses of *jus* in Latin, or with the Vedic and Zend *yôs*, *yaos*, to which words *jus* certainly bears the nearest outward resemblance[8].

It appears to me on the whole most probable that *suitableness* or *orderliness* was the original idea of the word *jus*. Anyhow it had come to be a word of *absolute approval*, without any reference to agreement, express obligation, or command. It may be replaced, if not exactly rendered, in all its earliest usages, by the English "*Right*." It does not either express or imply any divine imposition or utterance.

The *judex* is of course the person who declares or "shews" Right in the particular case before him. Though mainly known to us, during the greater part of the Republic, as the

[7] Geist, i. 267, 218.

[8] Unfortunately the meaning of these very words is not very clearly ascertained. I have taken them, in P. J. p. 18, on Benfey's authority, to mean "the Fitting" a meaning which passes easily into that of *suitableness* and *orderliness*. *Fitting*, *appropriate*, was the explanation given me, by an Indian pupil, of Pâli *yutta*. Others however give *yôs* the general moral signification of *good*, as derived from the particular idea of *purity*. See J. Schmid cited by Mommsen, Sr. iii. 310. 1, and Max Müller, Biographies of Words, p. 182.

style of unofficial referees in civil cases, *judex* and its derivative *judicare* were originally more general words. The former was applied to the early Consuls (or *Praetors*), the latter to the pre-republican Triers in the criminal charge of *perduellio*.

Jus, as a word, in its original sense, of common moral approval, is naturally the term used for customary or "Common" Law, as distinguished from Statute, *lex*. The more specialised antitheses of *jus civile* as opposed to Praetorian Law, to *jus gentium* and to Criminal Law, are results of subsequent developement, in substantive and adjective Law, which can only be explained by detailed reference to the later legal history of Rome. But the term *lex*, and its true meaning, require special notice at the outset, and the more so since recent discovery has thrown a new light upon the history connected with this word.

Jus differentiated into Law. According to the view here adopted, there is, in most beginnings of Ancient Law, no idea of Legislation, either directly by a Sovereign or indirectly by a Judge as representing a Sovereign. So, the regulations of primeval Rome were, to use Jhering's phrase, "obvious natural products[9]," though referred to pretended statutes of Romulus and Numa. Natural products they may rightly be called, as not matter of external imposition, but springing from, or at least supported by, popular feeling and belief. There is a step, however, from the matter generally approved or disapproved by current Morality, to so much as it is found necessary to endorse through the action of judge and people. Or, the process may be better put, as a crystallisation and limitation of *jus* in the wider sense of Right recognised by the common Moral Judgement, into Right recognised by authority—a developement from what we loosely call *national custom* into *judicial practice*.

[9] Geist, ii. 39.

Where any continuity of the judicial function exists—and some such continuity would appear to be essential to any thing like a national union—some general principles of authoritative Right must tend to become matter of record, if not in writing at least by oral tradition. The latter would seem to have been once the case at Rome, as may be inferred from the traces which we find of metrical form[10]. We can have no difficulty about the authors, to whom the developement of such principles must in this case be assigned. Whether the Pontiff was, as I myself believe, or was not, the prehistoric germ of the Rex, the Pontifical Board was historically connected, from the earliest times, with the administration of justice; and, after the direct administration had been monopolised by the King-Pontiff and had descended nominally from him to the Consuls, the Pontiffs still continued, for a long time, to be not merely recorders but official advisers, and, to some extent, presidents over the civil as opposed to the criminal branch of Law. The later professional developement of Roman Law in a non-statutory form, with parallels in modern Law, will be treated below, under the head of *jus civile*. To this subject belongs the use of *jura* = rules of Law, see § 7, pp. 361, 362. It is necessary first to deal here with the introduction and the essential features of Roman Statutory Law, and then to investigate the true meaning and practical importance of the general division into *jus scriptum* and *non scriptum*.

Lex, the Statute or Ordinance. In the original developement above suggested, of *jus* = *Law*, out of the administration of *jus* = *Right*, at a period when there is reason to believe in a primarily oral transmission of record, while some detail might no doubt be remembered of individual cases, the main result would clearly be rather in the nature of *generalisations*. These would naturally appear as *rules*,

[10] Sources, p. 21.

with the directly imperative form, such as we find in the rubrics of the old Roman religious guilds or brotherhoods. But, in spite of this form, it must be remembered that *publication* or express imposition is no necessary feature in a hierarchical record, part of which was still kept, down to a comparatively late period in the Republic, as a professional secret. On the other hand, publication *is* an essential point—originally, in my opinion, the one essential point—in *lex*. We are accustomed, from the legal writing of a comparatively late period, to associate this word necessarily with *latio*, or the bringing by a state officer, before a political assembly, of some proposal which is to be formally passed by that assembly. So we find, in our histories of the early Roman Kingdom, accounts of the King, the Senate and the popular Assembly enacting *leges* just as *leges* were enacted in the historical Republic, when the Consuls had replaced the King. But we must go behind these obvious anticipations of later practice to arrive at the original meaning of *lex*, and to see what light the meaning may throw upon the early developement of Roman Law.

I need not say that the mere style "*leges regiae*" cannot be relied upon to prove much, as it may be only due to some late editor of the Pontifical Books—a Papirius writing possibly in the 3rd century B.C. or, later still, a Granius Flaccus of the time of Caesar[11]. Either writer would no doubt use the word in its acquired technical sense, and assume all the republican formalities connected with it. Neither again are reported *speeches*, such as the Augustan writers put in the mouths of their characters, e.g. King Tullus' *duumviros secundum legem facio*, in Livy's trial of Horatius[12], of any more value than the style *leges regiae*. The earliest usages of the word *lex*, or its derivative *legare*, which can be considered genuine antiques, are the *uti legassit* clause of the

[11] See Sources, pp. 16, 17. [12] Livy, 1. 26.

Twelve Tables, referring probably to a previously recognised *lex mancipi*, and the "*secundum legem publicam*" of the old formula for making *testamentum per aes et libram* (Gaius 2. 104), where *lex publica* is generally supposed to mean the Code, or a clause of the Code, of the Twelve Tables. How both may be explained in accordance with the original meaning here attributed to *lex* will be shewn presently.

To get at that original meaning, three different derivations have been accepted or suggested by writers of Roman Law. The choice lies between *lex* = that which *binds*; *lex* = that which is *laid down*, or more correctly that which *lies*; and *lex* = that which is *declared* or *read*.

Lex, the declaration or reading. Although with some hesitation, from the number of opposing authorities, I venture still to maintain the derivation, suggested in my previous work[13], from the root of the Greek λέγειν and the Latin *legere* —a derivation which is adopted by Bréal, and was, in fact, recognised by Cicero[14], though he, after his fashion, tries to combine the later meaning, to *read*, with the original root-idea of *picking*, or taking one after the other, which survives in *legio* and perhaps in *conlega*. For other theories see note[15].

[13] P. J. p. 31. [14] De Legg. 1. 6. 19.

[15] Corssen's derivation of *lex* from *ligare* or a cognate stem—as that which *binds*—does not I think find favour with more modern etymologists. It is however adopted, though merely by the way, in Leist's Graeco-Ital. Rechtsgesch. and retained by Mommsen in his Staatsrecht (iii. 308). Mommsen adds, it is true, a different derivation in his note, but in the text speaks of *lex* as a *bond* or *contract*, with the special quality that the terms of this contract are exclusively formulated by the one party and simply accepted by the other. So *lex publica*, is, according to him, ib. p. 310, the State contract, i.e. the sum of the contracts which the individual citizen has undertaken, or to which he has succeeded, as dealing with the State. This last explanation assumes a theory which I venture to think an impossible anachronism for the obviously early date of the phrase *secundum legem publicam*—a phrase considered hereafter. The collective use, too, of *lex* is more like a very late meaning in Latin literature, where *lex* collective means generally a *body* of Law, than that in which it seems occasionally

The above derivation is open to no objection on formal etymological grounds: there is sufficient analogy for formatives with the "subjective suffix" *-s*, in a passive signification, though they are more often active; but the *meaning* has generally been found a difficulty. Two special objections I may note—of Corssen and Curtius—to *lex* being taken as that which is *spoken* or *declared*, on the ground that the root λεγ- only attains the signification to *speak*, in Greek, and that at a comparatively late date[16]. Now I myself believe

to be said, in early times, of the entire Decemviral legislation, as of one statute because passed at one time. The more recent philological research of J. Schmidt, referred to in Mommsen's note l.c., connects *lex* with roots signifying to *lay* or *lie*, from one of which undoubtedly comes the English word *law*. Jhering (Geist, i. 216, 217) and Curtius (Gr. Etym.[5] p. 364) appear to take *lex* from the transitive root, and accordingly as signifying, in its first sense, that which is *laid* or *imposed* on people. This sense does well enough for many of the Latin usages of *lex*, but requires some forcing to make it fit in with the use of the word in the private business of testaments and contracts. Its application to the directions given in a testament is, according to Jhering (Geist, ii. 206, 207) due partly to the original *statutory* character of the testament, partly to their own imperative form. The latter ground alone can be relied upon in the *leges* of contracts: the former rests upon a theory of *mancipation*, as representing an original Act of the people, which is more than doubtful. Sohm, Institutes of Roman Law (Ledlie)[2], p. 56, makes *lex* to be that which is *laid down* or *settled*, comparing the Icelandic, Frisian and Saxon words which correspond with our Law. But he also makes the proposal by one party and acceptance by another, noted by Mommsen, essential to the Roman use of the word. In fact both he and Mommsen insist upon a combination of the ideas of settlement and contract. Leist on the other hand (Graeco-Ital. Rechtsgesch. p. 608) citing Vaniçek, p. 832, makes *lex* like *lagh*, *lagha* simply = *die Liegende*, *die Lage* (οἱ κειμένοι νόμοι), adding, however, *Festsetzung*, *Gesetz*. So far as the derivation from *laying* or *lying* is concerned, Professor Skeat shews conclusively that the English *law* and the Latin *lex*, if they do come from the same root, must be referred to the intransitive rather than the transitive meaning. They may therefore mean that which is fixed or settled but they do not express imposition—certainly not *binding*. In Latin this intransitive meaning would be suitable enough for *jus*, the law of custom or practice, but scarcely for *lex* the statute.

[16] See, however, Buttmann, Lexilogus, p. 401.

that *lex* did mean originally the *declaration*, a meaning retained in *lex curiata* (see below). I would therefore suggest, in answer to these objections, that there is nothing impossible in the Romans borrowing a use (of the root common to both languages) in the sense of to *speak*, from the Greeks of lower Italy; that *lex* is not apparently the earliest word used for Law, by the Romans; and finally that the meaning of *legere* which has ultimately prevailed—to *read*—may not impossibly be accounted for by the association of speaking and reading connected with this very word *lex*.

Regiae leges, &c. The bearing of this derivation of *lex* upon the early history of Roman Law is important. Our accounts of legislation by the Kings, in which King, Senate and Assembly play the same part as Consul, Senate and Assembly in the Republic, are justly regarded with suspicion, partly on account of this very anticipation of later practice, partly on account of the inherent improbability of sovereigns, otherwise apparently almost autocratic, submitting to obvious constitutional checks. Much, too, of the subject matter referred to these alleged enactments, such as the complicated constitution, and the detailed system of Family Law, attributed to the legislation of Romulus, is clearly incapable of being put in any brief form, such as that in which we find the undoubted specimens of early legislation handed down to us from the Twelve Tables, as well as certain alleged earlier *leges* which were probably realities. For there are, besides the above allegations of what we may call later Parliamentary procedure, other traditions which simply speak of enactment or imposition, without any consent of Senate or People, by mere public inscription or posting up; and for some at least of these enactments there is the following obvious *raison d'être*.

While the so-called *regiae leges* (that is, the fragments which we possess) may all be said to be more or less "on

sacred matters[17]," there is also, in the majority of cases, particularly perhaps in those where we find *lex* expressly predicated, a distinct *exoteric* scope. They refer to matters which directly concern not only the priesthood but the people generally. They deal with religious offences which any member of the public may commit, and with the manner in which he must, for the sake of the whole community, expiate them where they are expiable, or be devoted to the offended deity where they are not. Rules on such subjects may no doubt have been at one time the *arcana* of a priesthood, brought out only *ad hoc*, particularly so long as the headship of the tribe or people was primarily religious. When, however, the secular was developed from, and absorbed, the sacred headship (which there is reason to think was really the order of things at Rome), these rules, though possibly originating as maxims in an ecclesiastical *dom-boc*, would come, in the interest of any government but a pure tyranny, to be *made public*, as tradition says they were; being not only matter of religious observance, but practically an embryo Criminal Law. This would seem, for instance, especially necessary in the case of such a rule as the remarkable *lex perduellionis* recorded by Livy[18], which, though it contains some features indicating a revision in early republican times, may well have dated, in the main, from the historical part of the regal period.

Here we have a simple *crime*, a secular offence against the community at large—*perduellio*, war on the *other*, i.e. the *wrong* side—the treatment of which, however, still shews such features of an archaic religious character as justify us in considering it the possible addition to a penal legislation against *sins*. We also have, not only the general reason above given, for publication, but a special one, in that

[17] See Sources, p. 13.

[18] As distinct from the *speeches*, see above, p. 302.

provision for Appeal, which it was particularly desirable to make known, in the case of so vague and general a danger as a charge of *perduellio*. There is probably, therefore, real truth at the bottom of such statements as that royal ordinances, nominally on "sacred matters," *were* made public by one king or another, and, after disappearing from lapse of time (or? an intervening tyranny) were again posted up for public perusal by a Pontiff[19].

In the remarkable inscription disclosed by recent excavations of the Roman Forum, I have ventured elsewhere to suggest that we may possibly have an actual remnant of tables of stone set up at the beginning of the Republic, usually dated 509 B.C.[20] Whether this identification be correct or no, that inscription conclusively proves the existence of rules of conduct published by inscription, as affecting the general public, at a time which, on intrinsic grounds, both of contents and script, has been put not much later than the date above named. Fragmentary as this inscription unfortunately is, enough is left to shew that in subject matter it closely resembles the *leges regiae* which have come down to us through other channels. So, though it may not be actually one of those *leges*, it affords a strong presumption that the story of their republication, with which that of a previous regal publication hangs together, may be a historical fact.

The view therefore seems at least tenable that *lex* was in its original and proper meaning a *declaration* or *proclamation*, made, in the regal times, by the King, which was also, in some cases, of a permanent prospective character, recorded by a public inscription. It was not yet a *lex*, in the later constitutional sense, because it is at least questionable whether the people were asked to accept, and fairly certain that they had no power to reject, it.

[19] Sources, p. 13.

[20] See Proc. Soc. Ant. of London, 2nd Series, vol. XVIII, p. 408.

Lex Curiata. All this tallies with the conclusions, at which our best modern authorities have arrived, as to the ancient *lex curiata*, except that this particular proclamation, not being a standing rule of conduct, did not require the written record which was reasonable or necessary for the other *leges* mentioned above. Of the *lex curiata*, probably the original of the later *lex de imperio*, we have not, as in the case of other *leges regiae* generally so called, any old fragment or quotation; for our only instance of such a *lex*, or perhaps rather of the *Senatus-consultum* preceding it, is not older than 69 A.D. How early the original proceeding arose, and when it acquired the title of *lex*, we do not know: but the connexion with the *curiae*, as representing the people, confirms the statements of historians which date the *lex curiata* from the regal period. This was undoubtedly, in republican times, a declaration of the magistrates, made to and accepted by the *Curiae*. Similarly in regal times it would seem to have been a proclamation made by the King; which may, perhaps, best explain the strange synonyme *lex regia* applied to the *lex de imperio* under the Empire. If, as it would seem, the proceeding was simply, in its origin, a presentation to the people followed by an acclamatory oath of allegiance, its resemblance to the regularly enacted statute of the Roman jurists is not very close. It has been suggested that, after *lex* had acquired, as its principal meaning, that of a statutory measure proposed by the magistrate and accepted by the popular assembly, this measure, being somewhat similarly proposed and accepted, attracted to itself the same name. To my mind the phrase *lex curiata* is more easily accounted for by reference to an original meaning of *proclamation*[21].

Lex Publica. I take it, then, that early *leges* in the sense of Ordinances or Proclamations are probably quite historical, both for the royal and early republican period.

[21] See on the *lex Curiata*, Mommsen, Sr. i. 609. 3.

As issued by the supreme magistrate for the time being, these are, in the general juridical though not in the technical Roman sense, Acts of Legislation. The term *lex publica* of the old testamentary formula (see Gaius, 2. 104; 3. 174), if admitted, as it generally is, to refer to the Code of the Twelve Tables, is perhaps better explained to be the (first) ordinance made *by the people* at large, as distinguished from King or Consul, than by an opposition, as I formerly supposed[22], to the *private lex* of a *mancipium*. How far such *leges* as may have been issued by the earlier republican authorities were intended to be permanent, or admitted to be generally binding, must be discussed hereafter. Those which look most like permanent legislation are apparently in close connexion with, if not part of, the *code* with which the historical Statute Law of Rome begins.

Lex Mancipi. If *lex* meant originally and strictly the *declaration*, this word is equally applicable to the official proclamation, and to the private oral statement (*nuncupatio*) of qualifying terms in a Mancipation. For, that this was the true meaning of the *lex mancipi*—not an assumed *quasi enactment*, nor the general idea of *bond*—can, I think, be clearly shewn; as can also the developement of an originally oral statement into the written *tabulae* of the will *per aes et libram*. It is to this will that the *legatum*, or declaration of a special trust incumbent on the *heres*, I think exclusively belongs. At least I know no authority for the existence of either the thing or the name in connexion with the older appointments of a *heres* at the *comitia calata*.

Legere and jus scriptum. The meaning, to *read*, of the Latin *legere*, as varying from that of the Greek λέγειν, to *speak*, may possibly be better accounted for by an association of the ideas of proclamation and public inscription or writing, as suggested in the above account of *lex*, than by the

[22] P. J. p. 32.

remarkable but somewhat unsatisfactory analogy of the German *lesen*[23]. The same association of ideas may also help to explain the common feature which, as I shall endeavour to shew, characterises all the forms of Roman Law classed under the head of *jus scriptum*. The original point, at any rate, of *lex*, as distinguished from *jus*, is, in my view, that it is not merely formulated into a rule, as the *jus* probably also was from time to time, by its professional compilers, but was *authoritatively made public* in its formulated shape.

It may be well to restate the importance of the step here supposed to be made. In *jus* we have a differentiation from what is generally regarded as *right* to so much of it as has been, and probably will be, so treated by authority; the differentiation being, however, a matter of court practice and professional knowledge, still liable to change and to question. In *lex* we have a self-committal by the authorities to a definitely expressed rule, which has passed out of their exclusive possession and therefore is no longer open to esoteric developement or manipulation (see below, § 6, p. 319).

The merit and demerit intended to be expressed in these words may be appropriately illustrated by phaenomena in Roman legal history. On the one hand we can discern the uncertainty and suspicion naturally attaching to a professional monopoly of legal knowledge, particularly when in the hands of a close and privileged order. This was, no doubt, one

[23] The meaning of this word has been derived, with some probability, from the root idea of *gathering* by *picking* one after the other, through the alleged ancient practice of writing the individual *runes* on their respective *staves of beech-wood*, which staves had to be *gathered* together in order to be *read*. But we have no clear vestige of any similar practice in the Italian peoples, and the scattered Sibylline leaves of Virgil (Aen. 3. 445—452) are surely a mere poet's fancy. The developement of the same root idea, in Greek, into that of *speech* is not easy, but may be considered as on the whole fairly well made out by Buttmann (Lexil. pp. 401, 402).

main cause of the agitation at Rome which led to the Decemviral legislation. It also, even during the gradual equalisation of the orders, explains the demand for Cn. Flavius' "publication," and for the "public teaching" of Ti. Coruncanius, which will be more particularly described in section 7. On the other hand we have the long series of later developements in the direction of general utility, which, under the name of *jus civile* or, more generally, *jus a prudentibus compositum*, form the main subject of the same section.

§ 6. JUS SCRIPTUM (Roman)

Jus scriptum and *non scriptum*, pp. 312—318. Promulgation, 318. *Jus scriptum* and Statute Law in wide sense, 319. *Lex* as to its juridical Source, 319—321. *Lex curiata*, *regia*, *publica*, 321. Publication, checks, conditions, 321—323. *Plebiscitum*, 323, 324. *Lex Hortensia*, 324. *Senatus Consulta*, 324—329. *Constitutiones Principum*, 329—331. *Res judicata* in general, 332—334. Imperial decisions and publication, 334—337. *Magistratuum Edicta* and *perpetuitas*, 337—339. *Jus gentium*, 339, 340. Parallels to Praetorian legislation, 340, 341. *Responsa prudentium*, 341.

Jus scriptum and non scriptum. It is impossible to avoid taking some notice of this distinction which, as being drawn from the preliminary matter of Justinian's Institutes, has had a natural attraction for modern jurists, but has unfortunately been adopted by different authors in very varying significations. At first sight, it is one of those verbal *dichotomies*, so much favoured by old writers, in which, if they are used as an exhaustive classification, one limb is often fairly well defined, but the other is an *omnium gatherum*, connected by a mere negation. The endeavour of this section will be to translate at least the defined or definable limb into a category possessing real importance in the point of view of Jurisprudence.

The division in question is not, so far as I can see, put to much practical use by Justinian. It is not even recognised in the parallel passage of Gaius, who proceeds, directly after

his distinction of *jus gentium* and *jus civile*, to give as an enumeration of the *jura populi Romani* the same list of particulars as that given by Justinian for *jus scriptum*. There may, however, be some reason for supposing a copier's omissions or blunders in this opening part of Gaius[1]: it certainly seems strange that he should say nothing about the *jus* in Justinian's second branch (*non scriptum*) "*quod usus comprobavit*," when *mores* and *consensus* are so distinctly recognised by himself in the body of his work[2]. Possibly, then, there was something in Gaius corresponding to the passage in Ulpian's Institutes, where he states Roman Law to consist *ex scripto* or *sine scripto*, as some laws of the Greeks are *ἔγγραφοι* some *ἄγραφοι*. This last is the passage adopted by Justinian in his Institutes, the law coming *ex non scripto* being subsequently defined as *quod usus comprobavit* and the two branches fancifully derived from Institutions of the Athenians and Lacedaemonians respectively[3].

The antithesis under consideration was no doubt borrowed from a Greek opposition of *ἔγγραφοι* or *γεγραμμένοι* to *ἄγραφοι* or *ἄγραπτοι νόμοι*. In the first uses of it by the Greeks we may suppose reference to have been actually made to early *inscription*, such as we read of in the Scholia on Plato[4] and can still see in the wonderful record of Gortyna. Very early, however—perhaps as early as Pindar's 6th Nemean ode[5]—*γράφειν* had become a mere metaphorical or rather technical term for legislative enactment generally, and the *ἄγραφοι νόμοι*, of which we read in other poets and

[1] See Huschke's remarks on the abrupt beginning of Ga. 1. 6, and his objection to *jura* as "vitiosum." Huschke's Gaius, 2nd ed. p. 24.

[2] E.g. Ga. 4. 27; 3. 82.

[3] Dig. 1. 1. 6. 1 and Just. 1. 2. 3, 9, 10. Moyle appositely quotes ch. 13 of Plutarch's Life of Lycurgus which may well have been known either to Ulpian or Gaius.

[4] See Politicus, 278 D: also Ruhnken's Timaeus, p. 170, under *κύρβις*.

[5] Nem. 6. 7 (c. 460 B.C.), *πότμος ἔγραφε*.

in the orators, though sometimes indicating legally recognised custom or practice, are more often, I think, purely moral rules of opinion or feeling, sometimes indeed a philosophical Law of Nature or of the Gods, as opposed to any Law whatever of Man[6]. So too, with Cicero, by whom or his teachers the antithesis may possibly have first been introduced, or popularised, in Latin, the idea is a very indefinite one. Although once or twice he seems to refer to literal writing, in another and a very striking passage *lex scripta* is coupled generally with Law of human origination, which we either read or receive or learn, as opposed to the Law of Nature, which is *nata*, matters of instinctive feeling, born with us[7].

After this vague use of *scriptum* and *non scriptum*, or its Greek equivalent, by the Romans at the end of the Republic we can scarcely suppose much reference to any Roman facts of *public inscription* to have been in their minds or in those of the still later jurists with whom *we* have mainly to do. For the true import of the distinction in any definite juristic sense we must come to quotations from the classic[8] jurists, and test the conclusions drawn from them by comparison with the particulars enumerated in Justinian's Institutes, specially those grouped under the head of *jus scriptum*, which grouping obviously comes from as early as the time of Gaius, whether he called the group *jus scriptum* or not.

[6] See ll.cc. in notes 1, 2 on P. J. p. 268 and add Sophocles, Ant. 454; Oed. R. 865, &c., &c. Leist endeavours (Graeco-Ital. Rechtsgesch. pp. 597—602) to make out τὰ ἄγραφα νόμιμα as more definitely a *Sacral recht*, not, I think, very successfully.

[7] Cf. Partt. Oratt. 37. 129 with pro Milone, 4. 10. See P. J. pp. 268, 269 and notes.

[8] I may anticipate the investigation of this term by saying that I take it to mean the jurists from the introduction of the *jus respondendi* in the time of Augustus, or rather Hadrian, to the reign of Alexander Severus inclusive.

Julian[9] opposes *scriptae leges* to the law resulting from *mores* and *consuetudo*. This passage, more fully considered below (§ 7), is the one upon which Austin I think mainly relies for his view that a *merely literal* meaning was attached by the Roman Jurists to the antithesis of *scriptum* and *non scriptum*, as against the "misconstruction" of modern civilians[10]. Read, however, in their entirety, the words of Julian do not press any such literal meaning; their main object being to contrast *formally enacted* with *customary* Law, which is certainly the gist of the short extracts that follow in the Digest, from Ulpian and Hermogenianus[11]. Nor is much weight to be given to a fanciful argument of Paulus that the Customary Law is too well authenticated to need putting in writing[12].

On the other hand there must be noted a very definite statement from the only continuous Roman history which we have of Roman Law, the Enchiridium of Pomponius. This jurist, writing under Hadrian, speaks of a special *jus civile* (which will be described in the next section) as having come down to his time *sine scripto* but *compositum a prudentibus* and still consisting *sine scripto*, solely in the interpretation of *prudentes*[13]. The matter, however, in question had been undoubtedly put in written form by authors ranging from Cn. Flavius at the beginning of the 3rd or Sex. Aelius at the beginning of the 2nd century B.C. to Q. Mucius Scaevola at the beginning of the 1st. Whether the opposition is, as I shall endeavour to shew, between Statutory (in a wide sense) and Text-book Law, or not, I hold, as has long been held by many students of Roman Law, that it cannot be taken in a bare literal sense, even with the qualification of Thibaut and Savigny. (See below, p. 317.)

[9] Dig. 1. 3. 32.
[10] Austin[5], 30. 541; St. 272.
[11] Dig. 1. 3. 33, 35.
[12] ib. 36.
[13] Dig. 1. 2. 2. 5, 12.

The particular items enumerated by Justinian[14] under the head of *jus scriptum* are: *lex, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium.* With one slight but perhaps significant change of phraseology (*placita* for *constitutiones*) these are the same as what Gaius tells us constitute the *jura* (see above, p. 313, n. 1) of the Roman People. The two last items have been very arbitrarily classed by some modern civilians under the head of *jus non scriptum.* It is, I suppose, this circumstance which leads Austin to say that in the view of these civilians *jus scriptum* meant only Law established by the *supreme* legislature[15].

Whether this was exactly the view of the said civilians, who *may* (see Warnkönig, l.c.) have regarded the *edicta* and *responsa* as originating in Court practice, and so *customary* Law; also whether their view was exactly, as Austin goes on to say, that of Hale and Blackstone, is by no means clear and seems to me, at this time of day, very immaterial[16]. For our immediate purpose we may equally pass by the use of the Roman antithesis by Glanville and Bracton, though the passages in question are of course important on the subject of early English Law as established by Custom or Practice[17].

To return to the particulars actually enumerated by Justinian: Thibaut, Savigny and many later German authorities take the meaning of the antithesis, with the Roman jurists, to have been *literal,* indicating that the *origin*

[14] Instt. 1. 2. 3.

[15] Austin, 28. 528; St. 253. It is scarcely worth while to hunt up these civilians. Warnkönig, Instt. § 52, is one of the clearest. I may note, in reference to the quotation from Austin, that he there uses "directly" as opposed to "indirectly" i.e. through a subordinate legislative source; not as opposed to "obliquely" i.e. through a judicial decision.

[16] See Hale's History of the Common Law, chs. 1, 2, pp. 2, 23, 25 and Blackstone's Int. § 3, pp. 63, 80.

[17] See below, § 8, pp. 389, 390.

(*Entstehung*) of the Law was or was not connected with a written record[18]. The affirmative is probably true of all the particular items of *jus scriptum*: the negative is only reconcileable with Pomponius' statement about his *proprium jus civile* by a somewhat arbitrary fixation of its "origin." The above explanation, however, is accepted by Austin and is backed up by a phrase *quod ab initio litteris mandatum est*, which looks like a quotation from Cicero, but which I cannot trace to any Latin original[19]. He also adduces the distinction, in old French Law, between *Pays de droit écrit* and *Pays de coutumes*, as a confirmation of his view on the original literal meaning of the phrase under consideration: but, as *droit écrit* here undoubtedly means Roman Law in general, the French antithesis does not throw much light upon a division of Roman Law itself[20].

If the meaning of *jus scriptum* adopted by Savigny and Thibaut was really that intended by the Roman writers, their classification is not, in the view of Jurisprudence, intrinsically important; nor do I think much greater weight can be given to the distinction drawn, as I understand him, by Warnkönig, and by a few others—the distinction, I mean, between a supreme and a subordinate legislative Source, in Austin's strict or juridical sense of that word[21].

According to my own view, which is, I think, that of a fair proportion of present authorities, however *jus scriptum* came to bear the meaning in question, the distinction, which is to be inferred from Justinian's particulars, as intended by

[18] Savigny, Syst. i. § 22, p. 106; Thibaut, Versuche, i. § 7.

[19] Austin[5], 28. 513; St. 255.

[20] Austin, 29. For this meaning of *droit écrit*, see Littré under *Pays*. Compare the meaning of *jus scriptum* in the mouth of our Bishops and Magnates, A.D. 1237, 1238; P. and M. i. 186, n. 3.

[21] See above, § 1, p. 21. This assertion of unimportance only goes to logical principle. On the *practical result* of multiplying subordinate legislative Sources, see § 4, p. 193.

the Roman jurists, turns rather upon a mode of legislation than upon a form of record or a grade of juridical Source.

The true *differentia* of the items in Justinian's *jus scriptum* (see above, p. 316) I take to be *publication* or at least *issue*, with the force and mostly in the form of *general rules*, by some recognised *political authority*—whether the authority in question were supreme or subordinate. The drawing up in a *written* form was also, I believe, common to all these particulars, though it does not appear to be necessary or essential[22].

Promulgation. Issue, i.e. a passing forth from the hands of the official framers (see above, § 5, p. 310) has been here purposely put as an alternative to *publication* because the latter, in its full sense, cannot always be very clearly made out.

There may be, in fact, some significance in the word which earlier modern civilians apparently used as their explanation of *scriptum* i.e. *promulgatum*[23]. At first sight this word would appear to be used in the later Imperial sense of publication after enactment, rather than in the Republican sense of submission of a project of Law to the enacting body[24]. In some, however, of the most important items of the *jus scriptum*—the *leges* themselves—there might be nothing beyond this precedent *promulgatio* (see below, p. 322). For a distinction between *promulged* or *unpromulged* Law, as emanating from a supreme or subordinate legislative source[25], I can find no foundation whatever.

[22] Girard[5], p. 3, Le *jus scriptum* est celui qui est produit par un des pouvoirs publics investis d'un rôle législatif, et qui normalement sera rédigé par écrit. With Jhering (Geist, ii. § 25), *geschreibenes* Recht is generally identified with *Gesetz*. Practically no notice is taken of the antithesis in Karlowa, i. § 58, on *Gewohnheitsrecht*.

[23] E.g. Heineccius Elem. 1. 2, § 44, note.

[24] See Dirksen's Lexicon for the former; Nizolius' Lexicon Ciceronianum for the latter. Also Mommsen, Sr. iii. p. 371.

[25] Austin[5], 29. 526; St. 262.

Jus Scriptum, and Statute Law in wide sense. The first branch or limb of the antithesis under consideration, as above understood, approximates closely, it will be seen, to the idea of "Statute Law" according to Austin's general, and very sensible, use of that phrase to signify "Law made by either a sovereign or a subordinate political authority directly as legislating, not indirectly as judging[26]." I propose to go through the different items in Justinian's enumeration, with principal reference to the three characteristics of (1) *general* form or character, (2) legislative authority or "juridical source," (3) issue or publication. In the main, the state of things selected for consideration is that generally recognised as true for the early Empire or the last century of the Republic: but it is impossible to avoid assuming or anticipating some conclusions as to earlier Law, the evidence for which will be given more fully in the later part of the present work. This is the more unavoidable because several historical statements embodied and applied in Austin's Jurisprudence must now be taken as incorrect or inadequate.

Lex as to its juridical Source is defined by Justinian to be the enactment of the Roman *populus* (i.e. the enfranchised members of the nation at large) on question put to them by a Senatorial Magistrate, such as a Consul: *Plebiscitum* being a similar enactment of the *plebs* on question put to them by a Plebeian Magistrate, such as a Tribune[27]. These sentences

[26] Austin[5], 29. 532; 37, 621; St. 267, 314; Dicey[7], p. 27, makes the difference, of written and unwritten, simply that of statutory and non-statutory. So, on the whole, Holland[10], p. 74, though not quite so distinctly. For Blackstone's strict or narrow meaning of the word Statute, and the superiority, for Jurisprudence, of Austin's use, see below, § 8, p. 378.

[27] Just. 1. 2. 4; cf. Ga. 1. 3. *Senatorio* is an emendation adopted by Dirksen and others; Mommsen retains *Senatore*. I cannot here enter into detail as to the proposing magistrates. See on that subject Mommsen, Sr. iii. 325. 1.

are, of course, an adaptation of Capito's definition[28] with special reference to the enacting body, the *generality of the command* being apparently assumed, or at least not being the point under immediate consideration.

This *generality* has been briefly considered in § 2, where we have seen (p. 56) how Austin shews that even a *privilegium*, favourable or unfavourable, must involve certain obligations upon members of the community generally. No such recondite reasoning, however, can be attributed to the Romans of the Republic. *They* called the resolutions conferring *imperium* upon Pompeius, recalling Cicero from exile, or directing investigation into the slaying of Clodius, *leges* simply because they were put to and carried by the *populus* or *plebs*[29]. Such special resolutions as were aimed *against* individuals were equally, as I understand the matter, *leges*, but were also *privilegia*, and so contrary to the Twelve Tables. It was apparently not till after the time of Sallust (d. 34 B.C.) that the restriction of the style *lex* and *plebiscitum* to commands of general application began to be recognised[30].

With regard to the political authority for the *leges*: the legislative function is alleged by classical historians to have been exercised by the Roman people from the first, and Austin accordingly speaks of *leges curiatae* or *centuriatae*,

[28] Lex est generale jussum populi aut plebis rogante magistratu. A. G. 10. 20. 2.

[29] The leges Gabinia, Manilia and Sestia are those intended in the cases of Pompeius and Cicero. Several others of a similar character may be easily recognised in Nobbe's or Orelli's Index legum. As to the proposal, by Pompeius as Consul, for enquiry about Clodius' death being a *lex* and also being represented as a *privilegium*, see Asconius in Milonianam, p. 37 (31 of Kiessling and Schöll).

[30] Sallust is *blamed* by Aulus Gellius (10. 20. 3, 4) for calling the proposal of Sulla (81 B.C.) *de Pompei reditu* a *lex*. It may be noted, by the way, that this and the direction about Clodius' death were *leges stricto sensu*, being proposed by a Consul: the others above mentioned were *plebiscita*, proposed by tribunes.

passed by the people assembled and marshalled in the ancient *curiae* or the later *centuriae*, as similar historical enactments[31]. It has been pointed out above (§ 5, p. 308) that the *lex curiata* specially so called, the predecessor of the *lex de imperio* does not appear to have depended upon any thing like a legislative (or electoral) *vote*, from the people to whom the proclamation was made. In the historical *leges curiatae* passed by the Pontiffs on questions of *arrogatio* the attendance of the people was apparently nominal and it is suggested that, throughout, their function in these cases was simply that of "assistance," i.e. general approval and future testimony[32], which it probably was with reference to the old *leges regiae*, then properly so called, as having been matter of proclamation *by* the King, whether recorded in inscription or not. How these *leges regiae* came to be disused, or confined to purely ecclesiastical rules, remains to be shewn in the fragmentary and obscure history of the early republican period (see also, Sources, p. 16). The republican *leges* attributed to predecemviral times—all not improbably genuine magisterial proclamations—seem on examination to partake rather of the nature of temporary and partial understandings or compromises, quite irregularly made and accepted, than of settled general rules, except a few of the latest, such as the *lex Aternia Tarpeia* (dated 454 B.C.), which would appear to be very closely connected with what I myself take to be the beginning of *leges* in the later juristic sense—the legislation of the Twelve Tables (450 B.C.).

Publication, checks, conditions. From this, the first *lex publica*, or People's Law, date then, in my view, the *leges jure rogatae*, regularly put to the *populus* assembled in their centuries and passed by their vote. As to publication, we have the following particulars of the late republican practice.

[31] Austin[5], 28. 514, 515; St. 256.

[32] See Mommsen, Sr. ii. 37, n. 3.

The proposed *lex* was formally posted up in public three weeks before being put to the vote[33], when the *rogatio* must be accepted or rejected unaltered. A certified copy was deposited in the *aerarium*, as a provision both for authenticity and safe custody[34]. No further publication or record seems to have necessarily taken place, except the reading over of the words of the *lex* from a written copy at the time of voting[35].

The checks upon, or conditions of, legislative action in the assembly of the people, which were enforced by the Senate or the patrician part of the Senate—also the marshalling and resultant character of the assembly itself—are matters of detailed constitutional History. The checks or conditions referred to were evidently reduced to a nullity by the Hortensian settlement between 290 and 286 B.C. The originally plutocratic character of the Centuriate assembly was, probably somewhat later, much modified in a democratic direction. This modification I myself connect with the reforms of Flaminius about 225 B.C.

For detail and evidence I must refer to the body of the following work. Suffice it here to say that, from the date of the Twelve Tables, we have *leges*, which were general

[33] Festus, 224 P. *Promulgare* leges dicuntur quum primum in vulgus eduntur quasi provulgari. Cicero, pro Domo, 16. 41. In...legibus trimum nundinum esse oportet. Cf. too Quintilian, Inst. Orat. 2. 4. 35. For fuller particulars see Krüger, Sources, p. 21, and the passages there quoted.

[34] Special provisions to this effect were made by the Lex Licinia et Junia of 62 B.C. (Schol. Bob. p. 310 on Cic. pro Sestio, 64. 135, cited in Mommsen, Sr. iii. 371. 4). See too Cic. de legg. 3. 4. 11. "promulgata proposita in aerario cognita agunto." Mommsen (l.c. n. 1) suggests *condita*. This would make the construction and meaning of *agunto* easier, but *cognita* is more in accordance with the provisions of the Lex Licinia et Junia. The complaint of Cicero in the same book de legibus (3. 20, 46), about the want of a public custody for the *leges* (see my "Sources," § 1, p. 25) probably only means that he would prefer a more obliging or dignified custodian, e.g. the Censor, ib. 3. 4. 11. See also Krüger, Sources, p. 24. 4, and Cuq[1], 2. 21.

[35] Asconius in Cornelianam, p. 58 (Kiess. and Schöll, 51). This was in fact a *plebiscitum*. For other cases see Mommsen, Sr. iii. 391. 3.

commands, communicated to and carried by the people at large —not present merely "by their representatives," according to Blackstone's theory of English Statute Law, which Austin treats with such over profound irony[36]. On the little which has to be said on *leges datae*, see below, p. 333.

Plebiscitum. On the original definition of this form of enactment merely by the proposing officer and enacting body, and on the subsequent confinement of the term to enactments of general application, enough has been said under the head of *leges* (above, pp. 319, 320). The circumstances of proposal and enactment also, so far as amounting to publication, were similar to those in that case.

As to the particular political authority, the assembly by which these resolutions were passed was expressly recognised, as having power thereby to bind the whole people, by the *lex*, properly so called, of the dictator Hortensius c. 286 B.C., and it thenceforth accordingly became, in Austin's language, a "subordinate legislative source." I cannot enter here into the detailed difficulties of the *leges* Valeria, Horatia and Publilia, but will attempt briefly to explain the difference between Gaius' and Justinian's account of the legislative body under consideration.

This was not, as we know, the entire **populus**, but, according to Gaius' Institutes the rest of the citizens without the patricians[37]. The objection of the latter to be bound by resolutions passed "without their *auctoritas*" or sanction, apparently refers to the *auctoritas patrum* of which we read in Livy, such *patres* being regarded by at least a large *consensus* of good modern authorities as the patrician members of the Senate. Here I must note that Austin, when referring

[36] Blackstone, Comm. i. 2. p. 185; Austin[5], 29. 526; St. 262. See P. J. p. 212.

[37] Gaius, 1. 3 and Capito "plebes...ea dicitur in qua gentes civium patriciae non insunt." Gellius, 10. 20. 6.

to this passage, as he clearly does in Lect. 28, p. 515, St. 257, is not correct in baldly calling this a refusal of "the Senate" to be bound by the *plebiscita*. Elsewhere, however, the same Gaius does define the Plebs as the "rest of the citizens without the Senate," and Justinian excludes *both* Patricians and Senators from the Plebs of the *plebiscita*[38]. The difficulty lies in the second passage referred to of Gaius, for Justinian merely combines the two. I would suggest that, in this passage from his Books on the Twelve Tables, Gaius may be giving an ultimate result. It is clear that in the later times of the Republic the opposition of Plebs and Senate politically replaces the old one of Plebeians and Patricians. Indeed it is at least maintainable that, after the *lex Hortensia* the Senators *may* have been the only persons disqualified from voting in the assembly which passed the *plebiscita*. In his Institutes, Gaius, going back as he often tends to do in that work, to the earlier history, is rather referring to pre-Hortensian question and debate. But whatever the exact constitution of the "plebeian" assembly came to be, its statutory recognition as a legislative authority is clear, and the treatment of the proposals laid before it amounted not only to an authoritative issue but, in effect, to publication. That the latter cannot be shewn to have been *expressly* made after enactment of the *lex* or *plebiscitum*, is perhaps, as has been suggested, the reason for the older civilians' cautious employment of the word *promulgatum* mentioned above, p. 318.

Senatus Consulta. The history of the constitution of the Senate is a long story, the different chapters of which can only be given in the subsequent part of this work. I must not however omit, here, to correct the erroneous opinion that the Senate ever included all citizens of patrician

[38] Gaius, ad leg. xii.; Dig. 50. 16. 238; Just. 1. 2. 4. In the explanation given by Dr Moyle[4], p. 102, of Justinian's *et senatoribus* he appears to me to overlook the passage of Gaius, ad leg. xii.

birth[39]. Actual individual summons to this House of Peers was necessary from the very first. I have given above (p. 205) my view as to the constitution of the Roman Senate after the passing of the *lex Ovinia*, which must be put at some date between 339 and 312 B.C. It is in the republican period following this law, some century and a half later, that the legislative power of the Senate appears to have been acquired, to which Gaius and Justinian refer in the items that, according to the latter, make up the *jus scriptum*. The following is a brief sketch of the growth of that power, in which all three points—political authority, generality of rule, and publication (see above) may to some extent be considered together.

The Senate was an advisory body to the Roman Executive, counsel being taken with it, according to constitutional usage, by the two chief magistrates of the Republic[40], not only on *leges* or other matters to be put before the people, but also on questions of their official administration. It is, apparently, rather to the latter that we must trace the growth of an independent legislative power in the body now under consideration. Having always a considerable degree of permanence, the Senate necessarily exercised, from the first, great influence over a headship hampered by duality and cut down from a life tenure to an annual one. Strengthened, after the Ovinian law, by the continual accession of new blood, in the shape of trained officials, it acquired during the long period of war with Pyrrhus and Carthage (280—202 B.C.) —particularly during the life and death struggle with Hannibal—something more than a mere advisory power in relation to the chief magistrates. Its resolutions or opinions

[39] Austin[5], 28. 515; St. 257.

[40] On the question whether they were *thence* called *Consules* or, as is rather believed by some, from their *duality* or *dual action* will be discussed hereafter.

were at first, as we should expect, *ad hoc*, i.e. they dealt merely with occasional questions of public order or safety. By the time, however, of the famous *Senatus consultum de Bacanalibus*, 186 B.C., we find the Senate drawing up and carrying, for public proclamation, general prospective rules, which fully amount, in form, to what we understand by the word Law, though the actual resolutions (*consulta*) do not appear to have been effective until endorsed by a recognised legislative assembly, in this case that of the *Plebs*[41].

This famous Senatus Consultum, though prospective and general, was, in scope and subject, mainly a matter of administration, of public order and police. How soon the Senatorial initiative extended to Private Law is not very clearly proveable, nor when it first assumed the character of independent legislation by ceasing to require the ratification of Populus or Plebs. Of the former extension Krüger mentions a case as referred to by Q. Mucius, which would place it early in the last century B.C. But the identity of the Jurist is somewhat doubtful[42]; nor can we with confidence date legislative proposals by the Senate on Private Law before the Empire. Of senatorial legislation generally, independent of subsequent ratification by the assemblies, there seem at first

[41] Livy, 39. 19. This original requirement for the efficiency of Senatus consulta which were to be *general* in the more usual juridicial sense, is probably the reason why the *generalitas* of Capito does not seem to come much into question here, such question being raised, if at all, on the following *lex* or *plebiscitum*. Advice or direction might no doubt be given by the Senate to the Magistrates, with reference to individual cases, but the Senatus consulta quoted by the jurists are obviously not of this character. Compare the consultation of the Senatus and the cruel carrying out of the Senatus consultum Silanianum in an individual case A.D. 61 with the previous general enactments of the Senatus consultum itself. The dates and passages for reference will be found in Dr Roby's good note R. P. L. i. 185.

[42] Krüger, Sources, p. 31. The reference (Dig. 40. 12. 23. pr, in which F reads Quintus *meus*) is to the regulation denying *proclamatio ad libertatem* to free men who allow themselves to be sold as slaves; which regulation is due to *some* Senatus consultum (Dig. 40. 13. 3).

sight a few instances traceable during the Republic[43]: but they are mostly, I think, cases, where the innovations in question might fairly come within the competence of the Magistrates, whose *edicta* were, however, in the cases referred to, undoubtedly prompted or directed by the Senate.

In the early part of the reign of Augustus, the difficult history of the *lex de maritandis ordinibus* (which obviously dealt with Private Law), beginning probably about 27 B.C.[44], seems to point to an original Senatus Consultum which was *not* complete without a following *lex*[45]. Gaius indeed himself (i. 4) tells us of a time, not apparently very remote when he was writing (c. 160 A.D.), in which the independent legislative competence of the Senate may still have been contested. This competence was at first, in all probability, rather practically than legally enjoyed[46]; but it must have become an obvious constitutional fact when both the older centuriate and the later plebeian assembly, which last seems to have been the special organ of confirmation for Senatus Consulta[47], ceased to exist. This was past history in Gaius' time and, earlier still, in that of Pomponius, who, writing under Hadrian, clearly indicates the actual replacement of the assemblies by the Senate,

[43] Mommsen, Sr. iii. 1236, 1237.

[44] See Girard[5], p. 875, n. 4.

[45] See Roby, R. P. L. i. 379, n. 1. Also Karlowa, i. 617.

[46] Mommsen, Sr. iii. 1237, 1238.

[47] Austin[5], 28. 516, regards an absolute *veto*, which he holds the Tribunes to have possessed, upon the proceedings of the Senate, as a sort of association of the Plebs with the Senate in the legislation of the latter. This view, at first sight attractive, appears to me to connect together, anachronistically, very different epochs of Roman History. The *intercessio* of the old plebeian tribunes, and their admission to the patrician upper House, had an original object very different from that of co-operating in legislation, had the Senate ever claimed such power in those early days. The co-operation of the assembly, which carried the later *plebiscita*, with the Senate, is a positive ratification, belonging to the time of that later antithesis or co-ordination, of a reformed Senate with a new Plebs, briefly referred to above (pp. 322, 324).

though he seems wrongly to attribute the change to a time shortly after the *lex Hortensia*[48]. The real legislator had, as we shall see, for some time been the Emperor.

From this brief historical sketch it is obvious that Senatus Consulta of a *general* character had been thoroughly established even in the Republic (subject to ratification), though they were no doubt accompanied, from first to last, by others of a particular and transient application. It is, of course, of the former that Justinian is speaking, as an element of *jus scriptum*.

The drawing up, commission to writing, and safe custody in state archives was evidently much the same as in the case of the *leges*. For the older stories of record see Sources, pp. 34—38. A historical deposit in the *aerarium may* perhaps be proved, for 187 B.C., by mention of that date (it is true only in a speech) in Livy; such deposit is clearly referred to in Cicero's Philippics, 44 B.C.[49].

As has been indicated above (p. 326) *authoritative issue* may be truly predicated of the *senatus consulta*, but a literal wider publication is not so easy to prove. In some cases as in the *Senatus consultum de Bacanalibus* the resolution of the Senate was ordered to be carried out directly under Magisterial proclamation[50], in others it was evidently intended to be embodied in a subsequent *lex* or *plebiscitum*[51]. Under the earlier Empire the Senate became simply an organ for the Emperor's legislation, expressed either in its own resolution or in his *Epistola* or *Oratio* addressed to it. Such communications would seem to have been regarded as publications in themselves, though they were occasionally accompanied by actual

[48] Dig. 1. 2. 2. 9. See Krüger, Sources, p. 111, n. 5.

[49] Livy, 39. 4; Cic. Phil. 5. 4. 12.

[50] Bruns[6], p. 161. See too the Edict of L. Sentius, p. 181.

[51] As may be shewn by independent statements of such legislation following. References to it in the *Senatus consulta* themselves are few and not very satisfactory.

proclamation to the "people," now the Emperor's subjects[52], or effectuated by notices, carrying out the particular legislation, in the Praetor's Edict[53]. Finally we come to the Imperial *Constitutio* pure and simple (see below).

Constitutiones Principum. As to political authority or "juridical Source," to use Austin's phrase, all the enactments hitherto mentioned are ultimately the act of a "corporate" Sovereign, i.e. the assembled Roman *Populus*[54]. The *Leges* were directly enacted by that body; the *Plebiscita*, though directly carried by the *Plebs* were clothed, by a law of the Populus, with the character of *Leges*; the *Senatus Consulta* intended for general enactments, though originated by the Senate, were required by constitutional theory, long continued in practice, to be confirmed by the Populus or Plebs. All these modes of legislation were retained for some time after the sovereign power had, in point of fact, passed into the hands of the sole "Commander" or "Chief[55]." The great modern historian of Rome speaks, indeed, of a Dyarchy—Princeps and Senatus—passing into a Monarchy between the time of Augustus and that of Diocletian or Constantine[56]; but, so far at least as legislation goes, the change was rather one of form than reality. All actual initiative was kept in the Emperor's hands by his power of filling, or absorbing, the great republican offices; and, in the end, we find the old legislative forms dying out one after the other. That with which the Emperor was most directly connected or which he

[52] See Mommsen, Sr. iii. 1264, 1265.

[53] As in the Senatus consulta Velleianum 46 A.D. and Trebellianum 56 A.D. See Ga. 2. 253, and Krüger, p. 114, n. 3.

[54] See Austin[5], 28. 514, 515.

[55] *Princeps* is often taken to mean Chief of the Senate: in the opinion of Mommsen, it meant rather chief citizen generally. *Imperator* seems to speak for itself: but the same authority makes it out to be Supreme Director, not simply military Commander. See below, n. 58.

[56] Mommsen, Sr. ii. 748, 749.

found most convenient—the Senatus Consultum—remained the longest; its subsequent confirmation by a phantom popular assembly being dispensed with and the assemblies themselves gradually ceasing to exist. In the end the Senatus Consulta came to be interpreted or superseded by the introductory address (*Oratio*) or letter (*Epistola*) of the Princeps, and shortly after the close of the 2nd century of our era they occur no more[57].

The *Constitutio* proper emanated simply and solely from the Emperor, whether we prefer to regard him practically as the autocrat or technically as the grantee of the People's powers[58]. In this case, as in the letter to the Senate, there is no doubt about the *authoritative issue* or the commission to *writing*: *publication* varies according to *generality* or otherwise, of *form* and *application*; on which last points an important difference in the Imperial *Constitutiones* comes to be considered.

Constitutio like its component verb *statuere* appears to be strictly and properly said of some standing and prospective arrangement[59]: but, as the Act of the Emperor, it is clearly extended by Gaius, and still more clearly by Ulpian, to other pronouncements, which are *not*, at least in form, of this character.

The *Edicta* (proclamations) and the *Mandata* (governors' instructions) had no doubt the statutory form of general

[57] The Senatus consultum Juncianum, Dig. 40. 5. 28. 4, *may* be as late as 182. Mommsen prefers an alternative pair of Consuls in 127 A.D. The unimportant Senatus consultum Gordianum however (Cod. 2. 12. 15) dates from 239.

[58] See Ga. 1. 5 as to the *lex* conferring the *imperium*: Ulpian, Dig. 1. 41. pr. as to the *lex regia de imperio*, by which the people confers on the Princeps *omne suum imperium et potestatem*. For the curious style *lex regia* see above, § 5, pp. 307, 308. For the text, as illustrated by the *lex* or *Senatus consultum de imperio Vespasiani* (A.D. 69), Bruns[6], pp. 192—194.

[59] See e.g. Cic. ad Att. 16. 16[c]. Rerum quas Caesar statuisset decrevisset egisset (? his ordinances, judgements or other public acts).

prospective rules, however they might vary in local scope, and possibly, at first, in *duration*, as depending on the individual Emperor's life[60]. The former were clearly published and there is some evidence of the publication of the latter.

The *Rescripta* and *Epistolae* (other than the *epistolae ad Senatum*) were replies from the Emperors, in the shape of a brief note or a full letter, to petitions, appeals or applications either from private persons or magistrates. Some, to judge from specimens preserved to us, were evidently of the same general form as the *Edicta* or *Mandata*: others, and perhaps the majority, belong rather to the class of individual judgements *Decreta*. The juridical character of these *Decreta*, as forming part of the *jus scriptum*, is one of the principal difficulties of that category, if at least one main feature in its contents *is* generality of rule (above, p. 318).

The *Decretum*, *Edictum* and *Epistola* are recognised by Gaius as three several modes of the Emperor's *constitutio* by which he "established" what had the force of *lex*: a result, he says, never questioned, because the Emperor receives his own *imperium* by a *lex*[61]. The *Epistolae* should be rather connected with the *Decreta* as they are in the more logical arrangement of Ulpian (below, p. 335); the *Epistola* and *Decretum* being, in the main, matter of Authentic Interpretation by the Sovereign, whereas the *Edictum* was, on the other hand, rather new Legislation by him.

I am obliged here somewhat to anticipate the subject of Case Law in general, because the effect of the Imperial decisions tends gradually towards that of the English Case, though I do not think they ever become exactly equivalent to it.

[60] Mommsen, Sr. ii. 905, 908, 1124, etc. What authority Austin has for calling these instructions *extraordinary* mandates (28. 518; St. 259) I do not know.

[61] Gaius, 1. 5, see n. 58.

Res judicata in general. I do not think that the principle of an individual judgement constituting a precedent is to be found in Roman republican Law and must therefore question Austin's view to that effect. More emphatically must I demur to "precedent" as an accurate rendering of *praejudicium*[62], which means rather some *previous proceeding* in the same individual case. What Cicero meant by *res judicatae* as forming part of *jus civile* is not perfectly clear. Boethius, in his comment, treats them as individual precedents[63]. But Boethius wrote five centuries and a half after Cicero, in times when the doctrine of an individual judgement, at least if coming from the Emperor, forming a precedent, had long been familiar. Some commonly accepted generalisation from Practice, by a leading jurist or text-book writer, is the utmost force that can safely be attributed to *res judicatae* in the Republic, except on the supposition that decisions on points of old Roman Customary Law (*jus Quiritium*) by the Centumviral Court may possibly have been recorded and formed precedents (see below § 7, p. 354).

Under the Empire the main, if not the only, authorities for a judgement simply *as such*, i.e. not as delivered by the Emperor, operating by way of precedent, are the following: (1) a rescript of Severus to the effect that in ambiguities arising out of statutes (*ex legibus*), *consuetudo*, that is the authority of an uninterrupted series of cases similarly decided, must have the force of statute[64]; (2) a rule laid down by

[62] Austin[5], 35. 596; St. 302.

[63] Cicero, Topica, 5. 28. Ut si quis jus civile dicat id esse quod in legibus, senatus consultis, rebus judicatis, jurisperitorum auctoritate, edictis magistratuum, more, aequitate consistat.

Boethius (Book 3 of his Commentary on the Topica), Res judicatae sunt quae inter eos qui super aliqua re ambigunt sententia judicum fuerint constitutae, quarum exemplo ceterae quoque judicantur.

[64] Callistratus, Dig. 1. 3. 38. Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter judicatarum auctoritatem vim legis obtinere debere. In this late author, the *disjunctive* force of *aut* must not be insisted upon.

Ulpian for a case where the pleader relies upon some local *consuetudo*. "The first thing to be enquired into," says he, "is whether the matter has ever been contested, and the custom confirmed by a judicial sentence[65].

Now it is obvious, at first sight, that these passages do not allege the establishment of new law by *any* individual judgement as precedent[66]: nor should I consider them further, but for the fact that they are rather puzzling when cited as quite general maxims of Roman Law, without distinction of *period*, and without question of what can be meant by Severus' *leges*. It is suggested that they, and several other passages on *consuetudo*, refer properly and originally to Provincial Law and that the difficulties, which certainly arise from their indiscriminate quotation for Law general, must be solved by reference to Provincial practice.

The *leges* spoken of in the rescript of Severus are probably the special enactments made, or charters granted, by the Emperors, in the case of Provincial Corporations, and often known as *leges datae*[67]. The decisions referred to, in both cases, are, I have little doubt, those of the *extraordinary* procedure which was gradually superseding that of the *judex privatus*, particularly in the Provinces, in the course of the 3rd century of our era[68]; of the decisions under which some record, whether official or not, was evidently preserved. Ulpian's *consuetudo may* have had a wider meaning, of Custom general, but that spoken of in Severus' Rescript, and in the Title on *longa consuetudo* of the Codex (8. 52), appears to be the Custom, or rather Practice, of a particular Provincial Court.

[65] Dig. 1. 3. 34. An etiam contradicto aliquando judicio consuetudo confirmata sit. On the translation of *contradicto* in an absolute sense, and *not* as agreeing with *judicio*, see P. J. p. 217, n. 11.

[66] See P. J. p. 218.

[67] See Mommsen, Sr. ii. 838; Cuq[1], 2. 25, nn. 1—3. For the various styles of these Corporations, *Officia*, *Curiae*, &c., see Cod. 8. 53. 3; also 1. 23. 7. 1.

[68] See Cuq[1], 2. 866; Girard[5], pp. 1068, 1069.

Its authority is rightly distinguished by Muirhead[69] from the formative jurisprudence of the Republic: neither in the one nor the other does an individual judgement form new law.

What constituted an "uninterrupted series of cases similarly decided" is not easy to determine. Unlike Ulpian's reference to an individual judgement in support of an alleged custom, this expression would rather suggest the generalisation of a jurist, practitioner, or judge[70].

Imperial decisions. The case is different with the judgements of the supreme Roman authority. Under the Empire there are indications, as early as Trajan's time, if not earlier, of individual *Decreta* or *Rescripta* by the Emperor being used as precedents, so that they came to be expressly placed on a level with *Edicta*, as general rules of Law. But significant instances may be quoted which seem to leave the question open whether it was the simple particular decision that operated like the precedent in an English case, and not rather some statement of a rule accompanying or implicitly containing the decision—one, in fact, of those general propositions which are, according to Austin, carefully and properly avoided by the English judge[71]. Wherever this was the case, the *Decretum*, or its accompaniment, is quite properly part of *jus scriptum* as here conceived, but is not true Case Law of the English sort. Another distinction is the one already pointed out that the *Decreta* which amounted to *Constitutiones* were, unlike English Case Law, confined to the immediate decisions of the Sovereign.

In the latest time, however, of the great Roman Jurists, we arrive at a nearer approximation in form, though not in

[69] Muirhead[2], p. 245, n. 5.

[70] See P. J. p. 218, for a comparison with the dicta of *our* old lawyers, whether authors of Text-books like Bracton and Fleta, or the Note-book writers of the Year Books, as truly described by Maitland.

[71] Austin[5], 37. 621, 622; St. 317, 318. See below, § 8, p. 397, and P. J. p. 248.

judicial Source, to our system of precedents. Gaius, for instance gives, in general terms, the force of Statute to the Emperor's *Decreta*, as well as to his *Edicta* or *Epistolae*, on the ground of his statutory authority. Ulpian, writing half a century later, and using a style (*quod Principi placuit*) not perhaps without its significance (above, p. 329), gives, in more detail, the name of Statute to whatever the Emperor has established (*statuit*) by letter or signature (see above, p. 330), whatever decision he has given on full hearing of a case, or whatever interlocutory order he has made out of Court; as well as to whatever he has prescribed by edict. These are all called popularly Constitutions: but obviously some of them are personal and do not form a precedent: where the Emperor has recognised and visited an individual's merit or demerit, or has given him aid without any precedent for it, such treatment does not go beyond the individual. All other Constitutions are general and binding upon everybody[72]. The last words are evidently a reference to the *generalitas* of Capito (pp. 55, 320), and the point here, of the whole passage, is its clear recognition of Imperial decisions as precedents for similar cases in future, except where they are *personal*, as above described.

In spite, however, of this sweeping statement of Ulpian, it would seem that either on account of the accumulation of Imperial decisions or on account of the difficulty of deciding

[72] Gaius, 1. 5; Ulpian, Dig. 1. 4. 1; Just. 1. 6. Justinian, while incorporating this passage in his Institutes, omits the interlocutory order, of which, however, as constituting a precedent, an instance is cited by Paulus in his *Libri Decretorum* (Dig. 40. 5. 38). This omission must not be taken as indicating any overstatement of Imperial legislative authority by Ulpian (as might perhaps be inferred from Karlowa, i. 650) or any subsequent restriction of it; but simply that the distinction of *de plano* and *pro tribunali*—in fact the public tribunal altogether—had disappeared in the later system of extraordinary procedure. See Cuq[1], ii. 869 and generally Girard[5], Tit. iii. 1, Introduction de la procédure extraordinaire.

what were *personal* cases, it was found necessary *e converso* to particularise such as were to have *general* effect. This is indicated not merely by such expressions as *epistola generalis* and *generaliter rescripserunt*, used by Ulpian himself and Marcianus his contemporary[73] but by later enactments of Theodosius and Valentinian (425, 426, 435 A.D.) apparently confining the effect of a decision for "settling the destiny of similar cases" to those which are called *generales* or *edictales constitutiones*, as having the word *edictum* inserted or a special clause appended, to the above effect[74].

Publication. It is suggested by M. Girard that the *decreta* and *rescripta* of the Emperors which were intended to have this general or *edictal* effect were officially published at Rome, whereas those which were not so intended were simply sent to the persons immediately concerned. A *generality* certainly, though not exactly the universal generality of Law, is shewn by an interesting inscription, discovered in 1868 in Bulgaria, to which M. Girard refers, containing a certified copy of a decision of Gordian 238 A.D. "from the volume of rescripts *posted up* (*propositorum*) at Rome in the portico of Trajan's Baths." For this decision, though so far of a public character that it affects a considerable community and its surroundings, does not appear to have that *general bearing* which is the characteristic of the so-called *edictal* rescripts. Karlowa, however, takes the same view as M. Girard of the *propositio*: viz. that it was only the rescripts settling doubtful points of Law, and therefore matter of interest to the general public, which were "for a short time" posted up. However short, the time would, of course, suffice for copying by jurists and entry in their books. Hence the formation of

[73] Dig. 11. 4. 1. 2; 35. 2. 89. 1.

[74] Cod. Theod. 1. 1. 6. pr.; Cod. Just. 1. 14. 2 and 3. (See, however, on the last, Mommsen, Sr. ii. 915, n. 2.) Note too the interesting mention of publishing these *leges generales* in the *programmata judicum, per omnes populos.*

such works as the *cognitiones* of Callistratus and the *imperiales sententiae in cognitionibus prolatae* of Paulus. Krüger's note on the subject deals mainly with the question whether the *originals* or *copies* of the rescript were despatched to the private or official petitioner. The practice on this point evidently varied at different times. An article of Mommsen, which first drew attention to the importance of the Bulgarian inscription, suggests *inter alia* that a *propositio* may have stood instead of entry (*insinuatio*) in the Imperial archives (*acta, commentarii*). If I may hazard a conclusion, confined mainly to the particular point with which I am at present concerned, I would put the matter thus. Strictly personal *rescripta* (e.g. Trajan to Pliny, 95, 107) were sent to the petitioner, through an official or directly, and *possibly* an entry made of them in the Imperial archives: in all cases which involved a public notice (e.g. the Bulgarian inscription), whether involving a change in general law or not, such an entry was made *and* a notice posted up as well[75].

This very interesting evidence of publication must conclude the brief notice which is all that I can give here to the difficult subject of Roman Case Law: but I must not leave that subject without a renewed caution as to the statements about the Imperial Constitutions in Austin's 28th Lecture, which should at any rate be checked by reference to more modern works such as those of Moyle, Roby, Girard or Karlowa.

Magistratuum Edicta, Perpetuitas. In what has just been said as to the *generality*, in the usual modern sense, or the *prospective* character, possessed by Imperial decisions, it

[75] See Girard[5], p. 61, n. 2; Karlowa, i. 651; Krüger, Sources, p. 128, n. 7. For the inscription Bruns[6], i. 248, for Mommsen's Article Zeitschrift der Savigny-Stiftung, xii. pp. 244—267, particularly p. 257. Of the two letters of Trajan, one contains a grant of citizenship to a centurion's daughter, the other refers to a grant of the *jus trium liberorum* (of which grants the Emperor expresses himself as extremely chary) to no less interesting a person than Suetonius Tranquillus.

was pointed out that this character was specially attributed to some of those decisions by terming them *edictal*. I come now to examine the *Edicta* proper, with reference to the characteristics above (p. 318) claimed for *jus scriptum* generally.

Publication is expressed in the name. All *Edicta* moreover have the feature of *authoritative* issue, being made under a general power of issuing notices and orders, enjoyed by all Roman magistrates, especially those invested with *imperium*[76] as to the matters falling within the circle of their official duty. This power seems to be more properly regarded as a matter of customary Constitutional Law than as conferred by any particular statute.

The *Edicta* with which we are here specially concerned are those issued by magistrates having *jurisdictio* (Praetors and Curule Aediles) and issued, in reference to that Jurisdiction, *motu proprio*, not merely by way of carrying out the directions of the Senate or any other political body (see above, pp. 327, 328).

I cannot here enter into the *history* of the above-named magistracies or of the *Edicta* specially designated by Justinian as parts of the *jus scriptum* and as constituting the "Honorary" or Magisterial Law. For the present I confine myself to the juridical *form* and *character* of the edict, as we know it from the extracts and references in Justinian's Digest, &c.

Of the reduction to writing and the posting up for public inspection, as a sequel to, or a substitute for, the literally oral proclamation described in the word *Edictum*, we have proof enough in the frequent references to the Praetor's *album* or whitened notice board[77]. The general and prospective character of the notices is also indicated by the recurring initial words *si* or *siquis*, in our quotation from Julian's Edict,

[76] Mommsen, Sr. i. 203.

[77] See ll.cc. in Karlowa, i. 460, 461; Mommsen, Sr. i. 206, 207, &c.

and the final *judicium dabo,...in bona iri jubebo,* or other future. The publications in question (*proposita*) are described by Ulpian as made for the standing business of jurisdiction (*jurisdictionis perpetuae causa*) as distinguished from what are made for one particular occasion (*prout res incidit*)[78].

Perpetuum, as applied to the Praetor's Edict, originally meant only *standing* during the individual magistrate's year of office; but, when the notices in question came, as they naturally soon did, to be in great part transferred or habitually transferable (*tralaticia*) from an outgoing magistrate's album to that of his successor, they became practically "standing" in a more extended sense. The question of *one* or *two* Edicts, the comparative fixity resulting from the *lex Cornelia* of 67 B.C., and the final consolidation by Hadrian in 131 A.D., are for more detailed historical treatment hereafter.

The subject-matter, which thus gradually acquired permanence, was more than a mere official framing of rules of procedure, which is the view that might at first sight be taken of the Praetor's Edict[79]. It really contained the formularisation, from time to time, of new relations and obligations arising in practical life which began to require recognition as legal rights and duties—a formularisation originally, it would seem, due to the work of unofficial practitioners and teachers, but turned into what was practically statute by the Praetor[80].

As the distinction of *jus scriptum* and *jus non scriptum* is rather one of Form or Mode than of matter or material source. I need not enter here into the subject of *jus gentium.* In respect of Juridical Source, the greater part of the Roman Law to which that name is applied belongs to the Magisterial Law of the Praetors and Aediles and is therefore in every

[78] Ulpian, Dig. 2. 1. 7. pr.

[79] See Karlowa, i. 461; also his note on p. 468.

[80] See § 7, p. 369.

sense *jus scriptum*. The remainder consists of such simple and obvious principles as must exist in any human society, and only come to be expressly recognised late in the day, when a legal literature has grown up and text-books begin to speak of a World's Law, which must, from its want of authoritative publication, be *formally* classed as *jus non scriptum*[81].

Parallels to Praetorian legislation. A comparison is drawn by Austin between the Praetors' Edicts and the "*regulae praxis*" published by our own Courts of Justice, or the *arrêts réglementaires* of the old French *Parlements* as distinguished from their *arrêts judiciaires* (judicial decisions), on the ground of their being statutory in form but published or promulgated by subordinate legislatures[82]. As to the alleged classification of the *Edicta Magistratuum* under the head of *jus non scriptum*, on this ground, see above, p. 316; as to the question of subordinate legislation in general, in point of modern practice and expediency, see § 4, p. 193. I am not here so much concerned with questions of Judicial Source, as of Form and practical effect. In the former respect the bodies of Law referred to by Austin resemble the Praetor's Edicts, but they differ considerably in the latter. Unlike the rules laid down by our English Administrative bodies (§ 4 l.c.) these Orders of Court really confined themselves in the main to Modes of Administration; whereas in the clauses of the Edict new Rights and Duties are obviously and all but directly created, so that it is rightly regarded by Karlowa as

[81] See further on this subject § 7, p. 366.

[82] Austin[5], 28. 522; St. 251. The Code of Procedure now in force with us was drawn up by the Chancellor and Judges of the Supreme Court, but under the powers given and ratifications prescribed by the Judicature Acts of Parliament. The old *arrêts de règlement* were regulations passed by the *Parlements* and *Conseils supérieurs* for publication, like laws, within their respective jurisdictions, which were to have the force of law subject to the good pleasure of the King (Littré, s.v. Règlement). The present French regulations of Procedure are direct Statute Law, similar to the other Codes.

mainly new "material," i.e. substantive Law (see above, p. 339, nn. 79, 80).

Last among the items enumerated by Justinian under *jus scriptum* are the *Responsa prudentium*, by which, it must be remembered, are only understood the opinions of the *prudentes, quibus permissum erat jura condere*[83]. The account given by Austin of that difficult phrase, as of this juridical source of Law generally, is vague and inadequate[84]. I shall endeavour to shew hereafter that these *Responsa* were not only written matter authoritatively issued but that they were probably rather in the form of general rules than, as Austin suggests, in that of individual decisions (see however, § 7, p. 374). But as the subject is a sequel or developement of the *Auctoritas* of the *Prudentes* generally, which belongs to *jus non scriptum*, it is better treated in the next section.

[83] Ga. 1. 7; Just. 1. 2. 8.

[84] Austin[5], 28. 523; 30. 546, 547.

§ 7. JUS NON SCRIPTUM (Roman)

Distinction of *jus moribus constitutum*, and *a prudentibus compositum*, pp. 342—344. *Jus moribus constitutum*, 345. *Consensus utentium*, 345—347. Morality and Custom, 347. Differentiation of both by judicial cognizance, 348, 349. When does Custom become Law, 349—351. *Jus a prudentibus compositum*, 351, 352. The Pontiffs and the *Jus Quiritarium*, 352—353. Not *judices* but advisers and recorders, 354. General record rather than specific precedents, 355. Early modifications of Law, 355, 356. The Twelve Tables and their Interpretation, 356—358. Post-Decemviral function of Pontiffs, 358, 359. The publication of Cn. Flavius and its sequel, 359, 360. *Legis Actiones*, what? 360. *Lex Ogulnia* and *publica professio*, 360, 361. The *jura* of Gaius, 4. 30. *Jus Aelianum*, 361, 362. *Jura veterum* and *Concepta verba*, 362, 363. Newer *jura* and authority of *jus civile*, 363, 364. Meanings of the phrase *jus civile*, 365, 366. The *jus civile* of Mucius and Sabinus, 367. Functions of later republican *prudens*, 367—370. Form and authority of *responsa* in general, 370—373. *Responsa eorum quibus permissum est jura condere*, 373—376.

Jus non scriptum (Roman). Justinian's slightly different phrase, the Law which *comes from non scriptum*, based on words of Pomponius[1], need not delay us; it being, however, clearly understood (see § 6, pp. 317, 318) that the antithesis between the two bodies of law actually designated by the Romans *scriptum* and *non scriptum* did not depend on mere writing: the *differentia* of *jus scriptum* being in reality one partly of general form, partly of publication and authoritative source,

[1] Pomponius, Dig. 1. 2. 2. 5. Jus, quod sine scripto venit compositum a prudentibus.

in the juridical sense of the word. We may pass therefore directly to Justinian's alleged sources of the other branch, now under consideration; namely *usus, diuturni mores* and that *consensus utentium*, through sanction of which these *diuturni mores* "copy Statute Law[2]." Postponing for the present the examination of this *consent*, as compared with enactment[3]. I must first call attention to another constituent of *jus non scriptum*, not mentioned here by Justinian, but expressly recognised by our main historical authority Pomponius, the consideration of which, taken in rather a wide sense, forms by far the most important part of the present subject.

Jus a prudentibus compositum[4] as distinguished from *jus moribus constitutum* may be roughly compared—for the two divisions do not exactly coincide—with Practice, as distinguished from Custom, the latter being non-statutory rules of Conduct obtaining among members of the community *at large*. This is clearly the meaning of *mores et consuetudo* in the passage of Julian shortly to be considered, and of Justinian in his definition of *jus non scriptum*. The *prudential* element in Law was no doubt intended by him to be covered by the *responsa prudentium* of *jus scriptum*.

Under Practice in its widest sense we may include all rules which will not come under the head of distinct enactment, and which yet result to some appreciable extent from the work of professional lawyers as distinct from the feeling of the people at large, whether the "professional" element consist of judges, practitioners, or writers on law. It must be admitted however not only that Practice has on occasion led

[2] Just. 1. 2. 9. Ex non scripto jus venit, quod usus comprobavit. nam diuturni mores consensu utentium comprobati legem imitantur.

[3] Julian, Dig. 1. 3. 32, see below, p. 346 and above, § 6, p. 315.

[4] The bad Latin of the heading *jus prudentibus compositum* is not, of course, Austin's, who quotes the right construction from Dig. 1. 2. 2. 5 in his text p. 563, but a printer's error carelessly repeated.

or originated Custom[5], but that these two elements of Law are often in legal histories interchanged or indistinguishably connected.

Mores, for instance, while named, on the one hand, as a source of Law which forms part of the fundamental relations of the Roman Family, or of the old Servian military system; also denotes, on the other, usage which evidently belongs to the late or middle Republican Praetor's Court[6].

Conversely, the *jus compositum a prudentibus*—a term which, I must remark, rather indicates literary treatment than origination—certainly included *inter alia*, or assumed, immemorial national principles or customs. The *compositio* in question is in fact an operation, through which both Custom and Practice have passed in ancient legal systems, and the importance of which is much underrated, as it seems to me, in modern ones.

The professional developement of Roman Law, which can be stated with some confidence on definite historical grounds, will form the main part of the present section, after the few remarks needed by the more hazy and debateable ground of Custom strictly so called.

Austin recognises both these constituents, as I have ventured to style them, of Law. With him, however, all rules, however well known or expressly formulated, of either class, are not constituents or sources, but merely *causes*, more or less remote, of Law[7], until passed as Statute by a Sovereign, or recognised in some judicial decision by a Sovereign's

[5] The change in our English Law, as to primogeniture in inheritance of land, effected by the Anglo-Norman Courts, is a notable instance. See Kenny, Law of Primogeniture, pp. 18—24; Pollock and Maitland, ii. 260—272; also above, § 3, p. 143 and § 8, p. 387.

[6] See Ga. 3. 82; 4. 27; 3. 224; Ulpian, Tit. 11. 24 and generally the passages collected in P. J. pp. 276—280. In all these I think *mores* only means *usage*: for what we might call its more *moral* meaning see P. J. pp. 102, 103.

[7] Austin[5], 30. 537, 538, 543, 544; St. 274. 276.

representative and so becoming matter of judiciary enactment. To this last subject, of Case Law, I have briefly adverted above (§ 6, p. 335) and shall return at the close of the present section. We have now to consider the law of Custom and Practice, as it appears to have been actually regarded and observed, without any idea of the transformation required by Austin.

Jus moribus constitutum. In speaking of this subject as a mode or form of Law, we may confine ourselves to so much Customary Law as is *general*. The English distinctions into *general, particular, peculiar* and *notorious*, treated by Austin in his 30th Lecture, turn rather on questions of special subject-matter and local scope, or of proof and test[8], than on the ultimate grounds or principles of all Customary Law. The judgements referred to for instance, on the subject of Provincial *consuetudo* in the previous section (§ 6, p 333) are simply *evidence*, not *foundation*, which would presumably be the same whether in the case of a *civitas* or in that of a *populus*.

Consensus utentium. Of the vague and difficult term *mores* I have endeavoured elsewhere[9] to shew that it often means a good deal more than the neutral "habit" or "usage." As coupled, however, with *diuturni*, it is evidently restricted to what I may call the *non-moral* meaning, in Justinian 1. 2. 9, and I shall accordingly pass on to the other point in his definition of *jus non scriptum* as illustrated by three well-known passages from the Digest.

In Ulpian's expression of "a tacit consent of the people confirmed by long custom," *consent* may mean little but *assent*. With Hermogenianus, the customary rules "observed on a par with written Law" are regarded as a tacit *agreement* (*conventio*) of the people[10].

[8] See below, n. 17, p. 349.

[9] P. J. pp. 102, 103.

[10] Ulpian, Tit. 1, § 4. Mores sunt tacitus consensus populi longa

But this idea of a tacit agreement—borrowed no doubt originally from some Greek source[11]—is most fully developed in the well-known passage of Julian, containing that comparison between a people's custom and a people's vote, which is stigmatised as "overflowing with errors" by Austin[12]. The *mores* and *consuetudo* of which Julian is primarily speaking in this passage are, it is true, those of some Province, but the principle is evidently general; and the reasoning, such as it is, refers to the Roman legislature when the *populus* was still perhaps in theory Sovereign, having been so in reality at the earlier time which Julian no doubt had in his mind. The objections therefore of Austin, on the ground of Hadrian's government being a virtual monarchy, need not take much consideration.

This comparison, between the general conduct and feeling of members of an association and the specific acts of the association as an organised body, is applied by Blackstone to the supposed origin of English Common Law, which he says was "probably introduced by the voluntary consent of the

consuetudine inveteratus. See too Hermogenianus, Dig. 1. 3. 35. Sed et ea quae longa consuetudine comprobata sunt ac per annos plurimos observata, velut tacita civium conventio non minus quam ea quae scripta sunt jura servantur.

[11] Aristotle, Rhet. A. 10, p. 1368. Κοινὸν (*νόμον*), *ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ*. See too Dig. 1. 3. 2 and P. J. p. 97, n. 1.

[12] Dig. 1. 3. 32. Julianus. De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est:...Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit, tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Austin[5], 30. 540, does not quote the first sentence, in which the word *legibus* is important, see above, § 6, p. 315. The earlier part of the above quotation is given to *Ulpian* in the Greek version (Basilica, 2. 1. 41) which adds the clause "nam cum... factis" as a note.

people[13]." It is no doubt vague and rhetorical, confusing not merely a positive act with no act at all, but also what is generally mere *assent* or *acquiescence* with definite *preference* expressed or not[14]: but it does implicitly recognise the historical fact that very early Law is and must be in accordance with popular feeling.

I have above endeavoured to shew (§ 3, pp. 131, 135, 136) that in the prior material, or inchoate Law, which belongs properly to the head of *jus moribus constitutum* as distinguished from anything obviously attributable to judicial, or other professional, introduction, we must again distinguish a *moral* element of absolute approval or disapproval from preference merely depending on grounds of convenience or utility[15]: custom in its strict sense belonging rather to the latter and being, as such, more amenable to professional modification. But, in both cases, precisely the same *differentiation* is required which turns *jus* Right into *jus* Law (see § 5, p. 300) and custom general into custom legal. The points of difference between the present writer's view and that of Austin are (1) that what he attributes to a Sovereign only is here attributed also to any regular Administration of Justice (which may or may not precede Sovereignty) within the State or the components of the State: (2) that what he regards as merely *cause* or *occasion* is here claimed as definite Source in a natural and ordinary sense.

Before proceeding to the historical and quasi-historical facts in the developement of Roman Law which I have somewhat loosely classed under the head of *jus compositum a*

[13] Blackstone, Int. § 3, p. 74. Julian, however, had more ground, as we have seen, than Blackstone for assuming an early legislative *populus*.

[14] Austin[6], 30. 541—543; St. 272, 273. Observe the editor's qualifying note.

[15] Religion is of course included under the former head, as it is very properly by Professor Holland in his "Sources of Law." Holland[10], p. 61.

prudentibus, I may briefly revert to the general subject called above the differentiation of *Jus* into *Law*, in view of a particular question often asked in Jurisprudence and not very easily answered, except by the orthodox Austinian—When and how does a rule of popular custom (or morality) become Law?

In treating of this question I must leave out of view *statutory enactment*, by which every modern at any rate will admit that Custom can either be legalised or abrogated; and also the Austinian theory of indirect enactment by the judge, simply *as the delegate of the Sovereign*.

The main instrument, undoubtedly, of differentiation or selection from among the more common usages or feelings of a people is judicial cognisance. But, in treating of general Jurisprudence, the view of an English or American writer is liable to be narrowed by modern English theory, in which much greater weight is given to the *individual* precedent than in foreign systems of Law, or, probably, in the earlier stages of our own. Allowing that the assembly, before which some Homeric judge or Hebrew priest delivers his decision, might perhaps be credited with sufficient coherence, or semi-sovereign power, to render the customary rule embodied in that decision, under Austin's theory, "judge-made Law"; I do not think that such a theoretical act of transformation is in accordance either with current opinion, ancient or modern, or with the facts, so far as we can piece them together, of early legal history. Nor, in the face of these facts, do I think that so much weight is to be given, as I was formerly disposed to give, to the external *declaration* involved in a hypothetical first decision embodying the previous customary rule[16]. I am now dealing, it must be remembered, simply with the mode or moment of the adoption whether of mere custom or of morality

[16] See P. J. pp. 166, 167.

as Law, not with any intrinsic differences between the two, on which enough has been said above.

Blackstone, in speaking of the *general* customs which constitute the principal part of the Common Law, distinctly attributes to them an intrinsic and precedent authority depending upon general reception and usage from time immemorial. The function of judicial decisions is to determine what customs shall form part (logically? *do* form part) of the Common Law, not to give them any new authority[17].

With Austin—to put very briefly the result of many passages in his Lectures—Custom however generally observed, and on whatever grounds, only becomes Law on being adopted by a Sovereign author either directly in the way of legislation or indirectly in the way of judicial decision[18].

Between these two extreme views may well be taken into account two or three varying answers by recent English jurists to the question put, in slightly different words, by Professor Holland—When and how does Custom become Law? Of these answers I shall only give what appear to me to be the main points.

Holland alleges that a Court gives operation to a Custom not merely (as it is supposed to do in the Austinian theory) prospectively, but also retrospectively: so far implying that it was Law before it received the stamp of judicial authentication[19]. Professor Brown[20] objects to this view—that judicial adoption of Custom proves the custom in question to be (or rather to have been) already Law. He goes on to point out—a fact more than once insisted on in these pages—that the Justice, which it is the function of all Courts to administer, is wider than Law. The retrospective

[17] Blackstone, Int. § 3, pp. 68, 69. See further below, § 8, p. 380.

[18] Austin[5], 1. 101—103; 30. 534, 543, 560, &c. See P. J. pp. 327, 328: references there are to edn. 3.

[19] Holland[10], p. 58.

[20] Brown, pp. 311, 312.

operation in question, therefore, is not, he considers, the application of a precise rule, dating back to before the occasion for its application arose, but that of general principles—moral obligation, reasonableness, &c.—such as have been discussed at length in § 3 of this work.

This doctrine, as to the wider scope of Justice than of Law, is a point so conspicuously made by Professor Salmond, that we naturally turn next to *his* theory of Custom being or becoming Law. Here, however, we do *not* meet with a reference to original principles but to facts or probabilities of *administration*, which may perhaps help us to give a slightly more satisfactory answer to Professor Holland's question than any at which we have yet arrived.

Custom is Law, writes Salmond, not because it *has been* recognised by the Courts but because it *will be so* recognised (in accordance with fixed rules of law) if the occasion arises[21]. The words which I have enclosed in brackets, may perhaps refer only to the conditions for recognition, by modern Courts, of some *local* or *particular* custom which varies from the ordinary Law (see above, p. 345 and § 8, p. 404). Indeed one of the main difficulties on this subject is that the dicta delivered upon it sometimes appear to have in view these special customs, sometimes the Custom general which is one of the constituents of old Common Law. In either case I should demur to the antecedent validity of the Custom, as Law, without some express act of the judiciary.

As a working hypothesis, which must be compared with, and tested by, the facts of legal history to be next considered, I would suggest that the moment when such custom passes into Law is neither that of the first individual decision on the subject, nor that of an implied previous acceptance; but rather the time when it begins to be recognised in the form of a general rule by the existing judiciary authorities or their

[21] Salmond[2], p. 157.

professional referees; which may either be published in the form of *lex* or may remain among official archives and tradition as *jus*[22]. This is the field of that wide and vague Source the *auctoritas prudentium*, which was not confined, as regards persons, to officials, nor, as regards occasions, to actual legal business. The scientific developement of Law in the Schools, and the Responsa of the licensed Imperial Prudentes are, in strictness, peculiar to Rome. But the generalisation of legal experience into Text-book form, with varying degrees of authority, is a common element of legal systems, from that of republican Rome to those of our own day.

The professional developement of Roman Law will be considered under the following heads: 1. The Customary Law of the early Republic and the Interpretation of the Twelve Tables; 2. The publication of Cn. Flavius and its sequel; 3. The *jura* of Gaius 4. 30, of the *jus Aelianum*, and of the early formulary system. Meanings of *jus civile*; 4. The *jus civile* of Mucius, Sabinus and the Digest; 5. The *responsa eorum quibus permissum est jura condere*. In the last heading we pass ultimately out of the subject of *jus non scriptum*, but the subject of the Responsa is too continuous to be divided.

Jus a prudentibus compositum. The professional developement of Law, as distinguished from legislative enactment, constitutes one of the most important, difficult and multifarious chapters of Jurisprudence. To this agency is due, at the one end of the history, the greater part of what is generally known as old Customary or Common Law, the actual source of which is, in many cases, obviously Court Practice. At the other end comes the English Law based upon individual judgements—the Case Law described by

[22] I must acknowledge my indebtedness for the first idea of this view to one of the Essays of Sir F. Pollock, who, if I remember, treats *formulation* as the moment of transition: but I cannot lay my hand on the passage. See further on this subject below, p. 369.

Austin—which cannot be exactly defined either as Practice or Statute, and which has no exact parallel in Roman Law, except perhaps in some of the later Imperial decisions (see § 6, pp. 335, 336). Between these extremes comes a vast amount of general rules or principles, partly under the shape of pleas, or precedents (in the sense of "common forms"), partly under that of legal literature, text-book or otherwise.

It is perhaps scarcely necessary to say that while Austin's general remarks on these subjects—mainly in Lectures 30 and 37—are, as always, worthy of attention, his statements of fact must be taken with an amount of caution and qualification necessarily resulting from the great increase in our knowledge of the legal history and institutions of Rome due to writers since his time.

The Pontiffs and the Jus Quiritarium. The functions of the Pontifical Board were, it is clear, primarily religious, but an extension of their province to much that we should consider purely secular matter is clear also. It was the exaction, for instance, of religious penalties and atonements which appears to have been developed, undoubtedly under Pontifical or Regal-Pontifical authority into an early Roman Criminal Law, part at least of which may possibly have been actually published in the form of inscription (see § 5, pp. 306, 307).

A special connexion between Pontifical presidence or supervision and Private Family Law, originally based on religious grounds, still subsisted in practice down to historical times (*testamentum comitiis calatis* and *arrogatio*).

That the same presidence or supervision once existed with regard to *litigation* in general would appear from the common commencement of all ancient suits at Law, which, in its origin, was undoubtedly an appeal to Heaven (*sacramentum*), and most probably required direct application to a Pontiff.

How much fixation of early Law, apart from statute (if

any statute existed), was due to those primeval Priests whom I take to have been the predecessors of the Pontiff-King, how much to the Pontiff-Kings themselves, or their coadjutors the other Pontiffs of the Regal period, we cannot determine. Only after the separation of the religious and secular authorities, on the establishment of the Republic, can we begin to assign the formation of a non-statutory Law to this quasi-legislative Board of Religion, as distinguished from the general sovereign body, whether we consider the Sovereignty to be vested in the People or in the People and Senate.

The secular jurisdiction over all cases, civil and criminal, which had certainly come to be vested in the King, is said to have descended generally to the Consuls or, as they were called by one of their two older titles, *Judices* (the other was *Praetores*, Leaders in War). The criminal branch, however, was much narrowed, and the so-called *leges* of the Kings (whether really published or not, see above § 5, p. 307, § 6, p. 321) were practically abrogated by the power of Appeal (*provocatio*) which, to some extent allowed under the Royalty, was established, more or less definitely, as a matter of right, at the beginning of the Republic. With the Criminal Law we have at present nothing more to do, than to remark how its narrowed scope was, in all probability, the reason why so much of what we should call *crime* was for so long a period, only prosecuted at Rome by private action.

The devolution of the King's *civil* jurisdiction, too, on the Consuls was probably, for the points of our present consideration, rather nominal than real. In this department it is not impossible that very little beyond mere formalities fell to the Chief Magistrates of the Republic. The majority of suits were very early referred, as a matter of course, if not of obligation upon the acting magistrates, to individual senators. These referees had already, before the time of the

Twelve Tables, assumed, in some cases, the name of *judices* which was ultimately given to all. Nevertheless, the person who gave the ultimate decision in a civil case (*judicium*) was, throughout the Republic and far into the Empire, rather of the nature of an *arbitrator* than of a decider on doubtful Law or legal Right. For questions of the latter kind recourse appears to have been had to the *Centumviri*, though it must be admitted that little is known, for certain, of this body. The view to which I myself incline is, that it was a very old Court, trying questions of Quiritarian, i.e. ancient Roman, Right; possibly once identical with the original Senate of 100, and from the first under the presidency of the Pontiffs. It was the latter who are consistently represented, in these early times, as the sole repositaries of legal record and form. They do not appear to have been, except over their own ecclesiastical *entourage, directly* magisterial or judicial: they were rather in the position of official advisers and custodians of legal tradition.

After the legislation of the Decemviri, we can indicate, with rather more approach to confidence, the mode in which professional developement of Law took place. Of the previous time we can only speak tentatively. Thus much, however, I think I am justified in hazarding, from the few remains that we have of the Regal and early Republican Law as recorded in the books of the Pontiffs.

Owing, no doubt, to the early severance of the *judicium*, or actual sentence, alike from the Magistrate's Court and from the Board room or Council Chamber of the Pontiffs, the legal records of the latter would appear to have contained little or no reference to specific precedents. Matter of doubtful or changing custom and national feeling must have come before their notice in the shape of concrete cases, and their opinion on such cases would have, through the instrumentality of the Praetor or *judex*, the *effect* of a judgment:

but it seems probable that such opinions were recorded, and may have been delivered, in the shape of general rules or maxims, which, though not statutory Law, as not *issued* by authority, would be much the same, in form, as the so-called Royal enactments which have come down to us. While the latter, however, being mostly of a criminal and exoteric character (above, § 5, pp. 306, 307) would naturally be made public, there was, in these *dicta* of civil Law, no such obvious necessity.

A considerable degree of *uncertainty* therefore both as to procedure and principles was, as we are told, the result, so far as the outside world was concerned; and this would of course be more particularly the case with the lower or Plebeian order, which had few representatives on the Senate and none on the Pontifical Board. Hence arose a great and increasing grievance, the demand for a Code, and the legislation of the Decemviri[23].

I have pointed out the *agency* and *mode* by which a professional developement of non-statutory Law may well have been produced from the very first historical times of Rome. I would now suggest what kind of *matter* was probably due to this source. In what I am calling, as opposed to Criminal, the Civil branch of early Roman Law, we can distinguish a good deal that must have grown up in *practice*, besides the very few fundamental principles, the origin of which we may fairly attribute to the immemorial usage of a warlike migratory race—such as the great parental power enjoyed at Rome, and the first rough mode of acquiring property by the strong hand[24]. Equal sharing, also, of an inheritance among those remaining in the family ("in

[23] To the above reason must be added the undoubtedly *oppressive* character, of the old customary Law, upon the Plebeian, or at least the *poorer* Plebeian, part of the community.

[24] Patria Potestas and Mancipium. See Ga. 1. 55; 4. 16, &c.

power") might seem to be a matter of obvious justice and automatic operation which we may refer to national custom[25]. On the other hand the recognition in a general way of *agnati*: the special *forms* required for mancipation, the principle of trusts or reservations which appears to have become engrafted on it, the alternative effect of *usus* in transferring property—all these would seem to be more or less the result of professional practice. For I must distinctly question an opinion attributing the *origin* of any of the last named institutions to the Twelve Tables, the language of which clearly shews, to my mind, that all of them were already known at the time of that legislation but were somewhat open to question, and therefore required a statutory settlement.

Such a settlement of disputed points in Substantive, and still more probably in Adjective Law (or Procedure), was perhaps the sole original object of the Decemviral legislation, which we know to have been primarily concerned with a regulation of Civil Procedure. It was however evidently extended in the process of drafting, and the Code was ultimately taken by many if not most of our juristic authorities as all-comprehensive. Hence the unwritten Law drawn up by Prudentes, which is known, says Pomponius, by the general name of *jus civile*, is represented by him simply as an Interpretation of the Twelve Tables, through the necessary medium of Court discussion[26]. The above seems the general sense of this difficult passage.

[25] As to the *filiafamilias*' sharing, and its being practically rendered of little effect by *tutela* see Muirhead, § 11, p. 44. On the overriding of such naturally general principles, mainly in the interest of the Crown, by the practice of our own Courts, see above, note 5, p. 344.

[26] Pomponius, Dig. 1. 2. 2. 5. His legibus latis coepit (ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritatem) necessariam esse disputationem fori. haec disputatio et hoc ius, quod sine scripto venit compositum a prudentibus, propria parte aliqua non appellatur,

A little farther on (p. 365) I shall have to speak of the various meanings of the phrase *jus civile*. In the passage just referred to it is used by Pomponius in the narrowest or strictest sense, to express neither the entire Roman Law, nor the entire Civil part of the Roman Law, in which Cicero *includes* the Twelve Tables[27], but a particular division of that Civil part. In respect of juridical character, this is *unwritten* Law, as not being authoritatively issued, but still only matter of national Custom or legal Practice. For its *juridical* Source, if I may somewhat misappropriate Austin's phrase (above, § 1, p. 21), we must look not to a directly legislative or judicative authority but to the class or order of persons specially skilled in Law—in the first instance *official* i.e. the Pontiffs, but ultimately the more distinguished *Prudentes* generally. As to its *literary* Source, it was to be found originally in the memoranda of the Pontifical College but afterwards not so much in any official document as in Text-books or in collections of forms and precedents, made by professional men as private persons.

It has been intimated above that some part of the matter contained in ostensible commentaries on the Twelve Tables was not improbably part of older Customary Law added by way of supplement. Such additions might, without much stretching of the term, be considered genuine Interpretation. But it is also clear that new additions were

ut ceterae partes iuris suis nominibus designantur, datis propriis nominibus ceteris partibus, sed communi nomine appellatur ius civile. I take the reference to *disputatio fori* to mean that the Interpretation was *originated* or rather *suggested* by contested cases. In itself it evidently partook slightly of the Authentic but more of the Doctrinal character. On these methods and on the connexion of the latter with Practice or Cases see § 3, pp. 119, 123. On a wider meaning sometimes given to *disputatio fori* see below, p. 373, n. 59.

[27] See Cicero, de Oratore, i. 43, 893. In omni jure civili et in commentariis pontificum et in XII. tabulis.

made by professional men, resulting from what is called in modern Jurisprudence *spurious* Interpretation, being matter which, whether or no *represented* as being actually latent in previously established Law, was really suggested by the experience of new cases or requirements. This is no doubt what Pomponius has in mind when he speaks, in another passage, of a process dating from the time of the Twelve Tables, namely the daily *improvement* and *extension* of the Law by experts, without which he says a body of Law cannot maintain its existence[28].

All this—the *jus civile*, in the strictest sense, pure and simple, was apparently matter of maxim or doctrine. But there is no doubt that great additions of new matter were also made indirectly, or rather unavowedly, as *Adjective* Law, by the framing of fresh forms of procedure "based on the Statute" to take Gaius' second explanation of the term "*legis actiones*[29]."

The agency, whether in the preservation of the old or the formulation of the new non-statutory Law, or in the drafting of fresh claims and pleas, was still that of the Pontiffs. One of them, we are expressly told, was yearly appointed to preside over private matters—practically Civil as opposed to Criminal Law—an arrangement lasting near 100 years[30]. This must mean the 84 years between the enactment of the

[28] Dig. 1. 2. 2. 13. Post hoc dein de auctorum successione dicemus, quod constare non potest ius, nisi sit aliquis iuris peritus, per quem possit cottidie in melius produci. Monro translates "there can be no *consistent* body of Law." With Dirksen, I take *constare* = *consistere*.

[29] Gaius, 4. 11. The Code of the XII is of course here referred to, whether *lex* is to be taken as the whole Code or the particular clause. I prefer the latter acceptation. As to what the *legis actiones* actually were, see below, p. 360.

[30] Pomponius, Dig. 1. 2. 2. 6. Omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis. et fere populus annis prope centum hac consuetudine usus est.

Twelve Tables c. 450, and the appointment of a judicial Praetor in 366 B.C.

It is not easy to say what was the exact function of the Pontifical Board, or their yearly nominee, which *ceased* on the latter appointment. It may have been some official advisorship to the home Consul, which was not so obviously necessary when a Praetor was appointed specifically for judicial work; it may have been some consent requisite to the allowance of a new form of suit. But, in any case, we are told that the Pontifical Board still remained, for another half century, the sole guardians of the old non-statutory Law, the sole draftsmen and repositaries of the new Law obliquely introduced by forms of plea based on the words of the *lex XII tabularum.*

The publication of Cn. Flavius and its sequel. It was apparently about 304 B.C. that what is called in one of our accounts the *jus civile,* which was, we are told, originally the special possession of the Pontifical Board, was surreptitiously divulged by Cn. Flavius the secretary of the great reformer Ap. Claudius Caecus, most probably with his connivance. Our accounts of this affair somewhat vary, accordingly as the particular writer dwells on its practical, political or simply juridical results[31]. The action of Flavius, or his patron, undoubtedly went as far as the posting up of the list of Law days (*Fasti*) in the Forum, and the publication of a set of *legis actiones*: whether it included any further statement of rules or principles of non-statutory Law is not quite clear.

The Court days, then, for knowledge of which we are told application had previously to be made to the Pontiffs, became henceforth public and the Table containing them was restored to its original position in the Code, which it

[31] See Livy, 9. 46; Cicero, de Oratore, 1. 41. 186; Pomponius, Dig. 1. 2. 2. 6, 7.

appears, according to Livy, to have lost in consequence of the burning of the city by the Gauls (see my Sources, pp. 14—16).

The "book" of *legis actiones*, which, Pomponius tells us, *is* (see below, p. 364) called *jus civile Flavianum*, was clearly *written* matter: but we must note that its "publication" is always represented as surreptitious or at least non-authoritative. The *legis actiones*, which had up to this time been developed, may have been "propounded" with a view to authoritative issue, in systematic form, by Flavius' patron, the Brougham of his time; and they must have come to the knowledge of successive Praetors: but the *jus civile*, as a whole, was regarded and treated, down to the time of Ti. Coruncanius, as a trade mystery or guarded professional secret, if no longer an exclusively Pontifical one[32]. And, even after Coruncanius' putting himself forth (*professio*) as a public instructor in Law, it is still in the juridical sense *non scriptum*, open to professional manipulation and developement, though not now in the interest of one Order (see above, p. 355, n. 23).

The *legis actiones*, I may here remark, of Ap. Claudius and Cn. Flavius, must not be identified with the five bare generic modes or headings described in Gaius, 4. 11—29. They were specific forms or pleadings *coming under* one or other of those five headings—mainly, it would seem, openings for a Plaintiff's application to the Praetor, devised to meet the continually increasing variety of new cases which had to be brought, somehow or other, under the old Statute Law of the Twelve Tables[33].

A far reaching result, either of the political depreciation of the Pontificate by Flavius' disclosures, or of the reforming movement due to Flavius' patron, was the throwing open of the sacred office to the lower Order at the beginning of the

[32] Pomponius, Dig. 1. 2. 2. 7, 35.

[33] This is well put by Muirhead in § 33 of his History, p. 173.

3rd century B.C. by the *lex Ogulnia*. Hence followed a freer handling of the ancient legal principles and practice, which seems to have been mainly though not exclusively the work of distinguished plebeian families[34]; and the formation, as has been pointed out, of a professional rather than an aristocratic and hierarchical order of legal authorities.

In the year 252 the post of Chief Pontiff was for the first time attained by a plebeian and outsider (from Tusculum) Tiberius Coruncanius. The *publica professio* introduced by this jurist is a great turning point in the development of the *jus civile*[35]. It may originally have been confined to the open delivery of opinions given on consultation upon matter arising in actual practice, as it continued to be with some jurists of distinction down to Cicero's time[36]. But it evidently led before very long to the introduction also of an independent system of *teaching* in Schools of Law, where not only was the Interpretation of the older Law treated, in the widest sense of the term, but general legal principles were discussed and developed by the putting of abstract questions and hypothetical cases. To this subject I shall have to return when I come to speak more particularly of the *responsa prudentium* (below, pp. 372, 373).

The Jura of Gaius 4. 30. We are now approaching the state of things which according to Gaius led to the introduction of the Formulary system. In company with a respectable minority if not a majority of later writers on Roman Law, I would place the *lex Aebutia* distinctly later but perhaps not very much later than the *Jus Aelianum* of

[34] E.g. Sempronii, Aelii, Porcii, &c.

[35] Pomponius, Dig. 1. 2. 2. 35. Ex omnibus, qui scientiam nancti sunt, ante Ti. Coruncanium publice professum neminem traditur: ceteri autem ad hunc vel in latenti jus civile retinere cogitabant solumve (read for *solumque*; Mommsen suggests *vel solebant*) consultatoribus vacare potius quam discere volentibus se praestabant.

[36] Cicero, Brutus, 89. 306.

Sex. Aelius who was Consul in 198 B.C. and may probably have written the *Tripertita after* his tenure of more active office[37]. This work was called by Pomponius the "cradle of law," which may perhaps point to its inclusion of older matter than even the Twelve Tables. We have not the book itself, but what we know of it throws a good deal of light upon the *jus civile.* It was in its main design a schedule of *legis actiones* based upon the several clauses or sections of the Twelve Tables. Each clause (*lex*) was followed by what was called its *interpretatio,* and this again by its particular *legis actio.* Hence the name *Tripertita* or the Triplets[38].

We can form a fair idea of this *interpretatio*—then, as always in Law, a very wide term—which probably constituted the first generally recognised document of the *jus civile.* It must have consisted of such legal principles or maxims of non-statutory Law (*jura*) as were from time to time by the scientific ingenuity of the *prudentes* classed under or based upon the brief and crabbed sentences of the old Code. Much of it may have been really old legal custom or practice not embodied in the Code. But a more important and increasing part was an endeavour to get principles, out of the words of the Twelve Tables, for new cases never contemplated by the Decemvirs. It is apparently of these artificially evolved principles and maxims, or rather of the applications to the Praetors based upon them, that Gaius writes in 4. 30 where he describes the subtlety of the old *prudentes* and the *jura* which they framed (*condiderunt*) as constituting such pitfalls for a Plaintiff[39]. For the Plaintiff had then, it would seem,

[37] He was Censor in 193.

[38] Pomponius, Dig. 1. 2. 2. 38. Tripertita autem dicitur (liber) quoniam lege XII tabularum praeposita jungitur interpretatio, deinde subtexitur legis actio.

[39] On the interpretation of *jura condere* see further below, p. 374. The vague use of the same plural in Justinian's definition of *obligatio* (3. 13. pr.) does not help us much.

to comprise *all* the legal grounds or principles, whereon he relied, which might be extremely technical, in his original application to the Praetor, and could not afterwards amend it. Cicero shews[40] how this was a matter of exact memory and careful regard to instructions, down to being letter perfect and following even the exactest punctuation.

I cannot here go into detail on the historical introduction of the later system of pleading, or, perhaps, to speak more correctly, on its extension, from mixed cases between foreigners, or Romans and foreigners, to cases between Roman and Roman. I think most students will now accept the view that the *lex Aebutia* must have come *after* the extended system of *legis actiones* framed by Aelius had, in its turn, been found inadequate, i.e. some time on in the 2nd century B.C. I myself have generally dated this *lex* about the beginning of the second quarter of that century, but there are good authorities who place it nearer the last quarter[41]. This is called the *formulary* system from the *formula* or written reference sent to the judex[42]: but its originally distinctive character is better expressed in Gaius' phrase *per concepta verba.* The improvement on the old system was to substitute for the risky unilateral application by the Plaintiff, with its forced employment of statutory words, a mutually made up reference containing a combination of such allegations and counter-allegations of legal principle as would put all the legal points of the particular issue before the *judex.*

[40] Pro Muraena, 11. 25. See Greenidge's Legal Procedure in Cicero's time, p. 163.

[41] My reasons for dating this *lex* c. 176 B.C. are given in P. J. p. 347, n. 30, but much has been written since the date of that book. In the latest article known to me on the subject (Zeitschrift der Savigny-Stiftung, xiv. p. 49), M. Girard places the *lex Aebutia* later than 149 and earlier than 126 B.C.

[42] *Formula* is also said of pleas, &c. constituting component parts of the total reference, but the meaning given in the text is the original and proper one.

This drafting *ad hoc*, i.e. for the individual case, is sometimes taken to be the *whole* force of the phrase *concepta verba*: but I must urge that here, as in several other compounds with the same preposition (e.g. *condictio*, *coemptio*, &c.), the idea of joint or mutual action must not be forgotten.

There was now no longer the same necessity and the same risk of the unilateral prayer, so closely packed and so scrupulously technical: but of course there was still the need of professional skill in drawing the new pleas with their allegations and counter-allegations of legal principles, and, as the basis of these, there was still the same need of the interpretation or practical expansion of the strict old Law—newer *jura*, of common sense, equity and public convenience, instead of the priest or schoolman's gloss on *dicta* uttered for a bygone age. All this also applied, no doubt, though naturally in a less degree, to more modern statutes than the Twelve Tables, like the *lex Aquilia*, as they in their turn became insufficiently elastic for newer requirements. It has been held that a certain amount of the older *interpretatio* came to be considered as almost equally fixed and statutory with the Code itself; and this might certainly be the case with well-known rules of Law on which everyone had long been agreed, whether they took their origin in legal or lay practice. But, except on such settled main points, the actual *authority* of the *jus civile*, as known to the jurists of the Digest, was probably measured by the reputation of the individual compiler (see below, p. 373): it was certainly not based on the English ground of individual judicial decisions.

In speaking of the Text-book or Form-book Law of Rome as *jus civile*, from the times of Flavius (see above, p. 360) downwards, I am following the language of the jurists cited in Justinian's Digest and probably that of the last century of the Republic. But the conception of a substantive body of Law *under this style* can scarcely have dated from much

before that century, and the style certainly requires explanation, as well from the erroneous derivation of *civile* by Gaius and Justinian, as from the various meanings borne by the full phrase and its modern descendant "Civil Law."

Meanings of the phrase jus civile. The explanation of Gaius and Justinian that *jus civile* is the law, as a whole, of a particular *civitas* gives us one use of the phrase—existing as early as the time of Cicero—but not its original meaning[43]. That meaning must, from derivation, have been "the law of the *cives*," the purely Roman Law, as distinguished from the law, which came to be administered during the two last centuries of the Republic, between *peregrini* (foreigners), or between *cives* and *peregrini* at Rome. The latter rules and principles, thus developed in Court practice, appear to have been partly a modification of the old national law, partly, perhaps in a less degree, an introduction of foreign—this mixed law being necessitated primarily by the practical requirements of commerce in the great emporium of Rome. The distinctive term *civile* as applied to law can hardly have arisen until a body of this mixed law began to be definitely recognised, i.e. until *jus civile* could be opposed to *jus Praetorium* or, perhaps, *jus gentium*[44]. The expression itself would be an anachronism

[43] Ga. 1. 1; Just. 1. 2. 1. See the passages of Cicero quoted in P. J. p. 355, n. 9.

[44] I may recapitulate here with a few additions and corrections what I endeavoured to make out about *jus gentium* in P. J. pp. 354, 355. Probably the expression does not occur before Cicero's time, if indeed it be not of his own introduction. He himself however (De Officiis, 3. 17. 69) speaks of a distinction drawn between *jus civile* and *jus gentium* by *majores nostri*; and the style *de jure civili may* have been used by M. Junius Brutus c. 120 B.C. (see Krüger, Sources, p. 75. n. 5, citing Mommsen on Cic. pro Cluentio, 51. 141). As to the meaning of *gentium, gentes* certainly cannot be *individual* foreigners (see Austin[5], 31. 557). They *may* be foreign *nations*, a pregnant use of the word occurring in Tacitus (Germ. 33), not to mention the later Capitolinus (M. Ant. Phil. 24. 3). But they are more probably *all* nations,

for the times of Flavius or even of Aelius: it is therefore really used *by way of anticipation*, in other accounts, as well as in that of Pomponius (above, n. 35) to indicate matter, which actually began to come into existence at once after the crystallisation of law into the Twelve Tables, long before there was any *jus gentium*, practical or theoretical, or any separate jurisdiction *inter peregrinos*.

As opposed to the World's law or Foreigner's law (whichever *jus gentium* means), specially administered by the Praetors, *jus civile* would include *all* Roman law properly and peculiarly Roman. That it is often used in a narrower sense, excluding the Roman *Statutes*, is due to the distinction of *lex*, Statute, from *jus*, Law, mainly of Custom or Practice. A still further limitation is due to the fact that this development and branch of Law was mainly if not exclusively confined to the area of *private citizens'* legal business and suits, as distinguished from the charges or accusations (*crimina*) which were brought before, or by, or in the interest of, the People, and were hence *publica*. This is the best

including the Roman (see Karlowa, as against Puchta, i. 456), and the genitive may be compared with that in the phrases *unde, ubi gentium*, whence, where, &c. *in the world*. Horace's "terruit urbem, terruit gentes" of Odd. 1. 2. 5, is a climax, "Nay the whole world," indicating a relation, not of two separate districts, but of centre and circumference (cf. the old Papal allocution *urbi et orbi*).

The idea of a World Law having been once taken up, it is easy to see how it would come to include not merely the new law actually introduced by the Praetors and Aediles, but all such obvious and indispensable dealings as must have taken place, or may be reasonably assumed to have taken place, from the beginning of any human society, e g. passing of property by *delivery*, acquisition by *occupation*, contract by *consent*, &c. Man's use of this "law" is like Mons. Jourdain's having talked *prose* all his life. See P. J. pp. 361, 362 and Karlowa, i. 453—456. As regards its actual contents, the *jus gentium* used (Gaius, 1. 1) by the Roman people is little more than a negative category, including so much of the Roman Law as is not specifically and exclusively Roman.

explanation of the antithesis between Civil and Criminal Law[45].

The jus civile of Mucius and Sabinus. The work which may possibly have first borne the actual name *de jure civili* (see however above, n. 44) was written by Q. Mucius Scaevola the Pontiff (d. 82 B.C.) and was, at any rate, according to his commentator Pomponius the first arrangement of the matter known under that name by principles or subjects[46]. We have no quotations in the Digest directly from this book, though we have a few from another work of Mucius, who is the earliest author there cited. His *jus civile* would seem to have been superseded by the commentaries in which it was incorporated, notably by the later work of Sabinus on the same subject: the latter book again is only known to us indirectly in the Digest, through extracts from Pomponius, Paulus and Ulpian *ad Sabinum*[47].

The functions of the later republican prudens. What has been said above on the improvement and extension of the Law by earlier professional men, in this particular department of Custom or Practice, may be here continued and amplified by what we can learn as to the functions of the later republican *prudentes* from Cicero or from our stray notices of the century before him.

To begin with, the part of the *prudens* must now be distinguished from that which Cicero himself filled with such distinction as *patronus*. How soon the old world function, of backing one's *client* by influence in Court or elsewhere, began to be developed into that of professional pleader, we

[45] For other modern meanings of Civil, and for the particular antithesis of Civil and Criminal, see the later sections on Rights and Wrongs and on Particular Wrongs. The general distinction of Law as Public and Private is treated under a separate head.

[46] This seems the meaning of Pomponius, Dig. 1. 2. 2. 41.

[47] Sources, pp. 103, 107: also Roby, p. cviii. Our few direct quotations of Mucius are from his Definitions (ὅροι).

cannot exactly say. The coming into existence of such pleaders in 204 B.C. seems proved by a clause of the *lex Cincia*, passed in that year, against fees paid *ad causam orandam*, while occasional references in the contemporary plays of Plautus might rather indicate the vanishing semi-feudal relationship of the original patrician *patronus*. There is a general detachment, from actual pleading, of the later *prudentes* as a class: they were rather sages in law, teachers in law and draftsmen.

In all three capacities, though mainly perhaps in the two first, we can trace the agency of professional men, as contributing to the formation of a *jus non scriptum*. Cicero attributes four functions to the *prudens—respondere, cavere, scribere, agere*: he does not, however, intend by the last actual pleading in Court, but only, as Dr Roby suggests, advice on the conduct of a suit[48]. *Scribere* would of course apply to the writing of text-books in the strict sense, i.e. educational or scientific works on Law, as distinguished from Precedent books for practice; but it undoubtedly includes also the drawing of Forms. The expression *scribere dicam*, used from the time of Plautus to that of Cicero and appearing as *scribere formulam* in Quintilian[49] clearly indicates the drafting of claims and pleas whether under the old system of the *legis actiones* or the later joint building up of the

[48] Cicero, pro Muraena, 9. 19; de Orat. 1. 48. 212. Note his eulogy of oratory and disparagement of *civil law* in the following chapters, 53, 54. Roby, R. P. L. i. 14, would also appear, with some hesitation, to *confine scribere* to writing treatises.

[49] I can here only indicate one or two main points in the history of this interesting phrase. If borrowed from the Greek, it is nevertheless *not* specially applied to *accusation* if at all: indeed, in the Greek, γράφεσθαι δίκην is used of a private suit (Arist. Nubes, 756—780). This is clear as to the Latin from Terence, Phormio, 329, and Plautus, Aul. 753. Nor does it seem to belong only to provincial jurisdiction, as might perhaps be inferred from Greenidge, Leg. Proc. 144. n. 1. See too Karlowa, Civilprozess zur Zeit der Legisactionen, on Cic. Verr. ii. 15 (p. 256).

formula for the *judex* (see above, p. 363). The same wide expression would no doubt cover the devising of the special terms, *leges* (see above, § 5, p. 309) of contracts and fiduciary conveyances.

Cavere refers more particularly to security taken in the shape of Stipulations, which though strictly oral in form, were obviously soon reduced also to writing.

I have pointed out above (p. 362 and § 6, p. 339) how the drafting of new pleas &c. for the *formula*, was undoubtedly the vehicle for the introduction of new law, and we see how the Praetor's adoption, in his expressed intention to observe such and such a rule, or to grant relief in such and such a case, for the future, ended in the conversion of the new matter into virtual Statute. So much, then, of the work of the *prudentes* became *jus scriptum*, so soon as the Edict gained any degree of permanence.

Apart also, perhaps, from inclusion in the Edict, precedents of professional Practice, in the shape of stipulations, terms of contract, and forms of claim (*actiones*) are recorded as having come down to our extant writers in Justinian's Digest from those whom they called "founders of the *jus civile*," such as the two Catos, Brutus and Manilius, who belong to about 150 B.C.[50] Having but few direct quotations from these writers, and no account of the scheme of their works, we cannot say whether the original Law and its specific developement was made a main point, as we are told it was by Aelius (above, p. 362) or was treated as merely ancillary to the forms and *actiones*[51]. In the later works, however, from which quotations have come to us more fully, as the position of *teacher* becomes more prominent, we find statements of principles or rules of Law, in *responsa*,

[50] See Sources, p. 102. Add, as to the *Muciana* cautio, Roby, cviii.

[51] It appears to have been the latter in the case of Manilius. Note on the other hand the *regula* of the younger Cato, Dig. 34. 7.

equalling or almost exceeding the space devoted to forms and precedents.

Form and authority of Responsa in general. This subject requires a little consideration independently of the special effect of the licensing system introduced by Augustus and Hadrian, which will be treated below. Moreover, what is here said, must be taken as applying not only to the developement of the *jus civile* hitherto described, but to a similar developement of Edictal Law, when the Edict began to be practically Statute and finally became, under Hadrian, a closed text (see § 6, p. 339). The literary treatment of the Edict necessarily begins later than that of the *jus civile* by Q. Mucius and Sabinus (above, p. 367), and the extracts from the respective commentaries are kept apart in the so-called "Edictal and Sabinian Masses" of the Titles or Chapters in the Digest: but the form and authority of the *responsa* and the circumstances or occasions on which they were given are the same in both cases.

Respondere in its earlier use, e.g. in the time of Cicero, may have been confined to an opinion given originally on some point of law arising in actual practice, to a consulting client. This might be used for the framing of legal instruments (deeds, wills, &c.), or for the drawing of pleas in a suit. Again, after the issue had been settled, it might be used in support of a client's plea, on the hearing, or more directly in answer to some doubt on a point of law in the mind of the *judex* himself. These two last uses seem clearly indicated in Gaius, 1. 7 (see note 62) where *sententia*, if distinguishable from *opinio*, may possibly mean the answer to a question put by the *judex* himself. The general effect of the debated passage in Pomponius[52] is to contrast the comparatively informal

[52] Dig. 1. 2. 2. 49. Nec responsa utique signata dabant (sc. prudentes) sed plerumque judicibus ipsi scribebant aut testabantur qui illos consulebant. I still venture to take *ipsi* as meaning the clients, and *testabantur*

transmission of the unofficial opinion with that of the licensed counsel accredited by his seal.

From this use of *responsa* as given to or cited by a *judex*, on the occasion of actual pending cases, they have been spoken of by Austin in a manner somewhat liable to be misunderstood[53] as if they were *judgements* on an individual case. Literally they were certainly not judgements, although they came in as important grounds for the judge's ultimate sentence, particularly after the rescript of Hadrian.

Previous to the Imperial license or patent (of which I have next to speak) we have clear evidence from Cicero that *responsa* so given or cited might be accepted *or not* by the *judex*. Moreover they would appear to have been mostly given and produced in an *abstract* form—that such or such a principle was *law*. Indeed the language of Cicero is often quite compatible with the idea of the opinion having been originally given quite independently of the particular case on behalf of which it is alleged in Court[54].

To take instances:—We gather that the recorded *responsa* of Cato (most probably the younger) and Brutus were made to consulters on actual cases, but were afterwards quoted as general law, and might with advantage, in Cicero's opinion, have dispensed with some of the recorded particulars[55]. The *regula Catoniana* referred to as a *bene scriptum* by Justinian, and quoted but not absolutely accepted by Celsus[56] was clearly recognised by that Jurist as a general maxim.

From the speech for Caecina already referred to (n. 54) we learn that the opinions of Q. Mucius and Manilius (see Sources, p. 102) were quoted as authorities for the *jus civile*,

"called in the *prudens* to attest his opinion." *Contra*, Roby, De Usufructu, p. 102, n. 1.

[53] Austin[5], 30. 545; 37. 626; St. 213, 317.

[54] Cicero, pro Caecina, 24. 67—69.

[55] Cicero, de Oratore, 2. 33. 142.

[56] Just. 1. 11. 12; Celsus, Dig. 34. 7.

but that it lay entirely with the judges—in the particular case the *centum viri*—to accept either or neither opinion as law: the law itself being spoken of in language which seems to have been in the mind of Blackstone, when he dilates on our own Common Law as not made but declared by judges, being something permanent and antecedent, merely disclosed or applied in the individual decision[57].

When therefore we are considering the answers or opinions of the latest republican and early imperial *prudentes*, not only must we leave the role of judge out of the question—for their *responsa* were certainly not *judgements*—but we must probably recognise that of law lecturer beside that of consulting counsel. These opinions began to be delivered at least as much upon questions raised in the Schools as for cases coming before the Court. So we find in most of the juristic *dicta* which have come to us, even where given on a particular case, and in no way systematised into an educational work, a *generality* and an endeavour to lay down *principles* which is far removed from the studious narrowness of an English judgement, at least as represented by Austin[58]. A practically identical treatment, by Roman *prudentes*, of the actual and the hypothetical case, is certainly obvious in the Digest extracts from works entitled Responsa, Opiniones, Disputationes, Quaestiones and the like, where, of course, the fact that all were ultimately turned into so many *leges*, by Justinian, makes no difference in the original character of the extracts themselves.

Some, from the inclusion of unnecessary particulars or local circumstances, have the obvious appearance of opinions

[57] Cicero, pro Caecina, l.c. See too Krüger, Sources, p. 150; Blackstone, Int. § 3, p. 73, and above, p. 349.

[58] See Austin[5], 37. 626, on which I have commented in P. J. pp. 248, 299. I do not think the reluctance to formulate principles is so apparent in judgements of the present day as it was to Austin.

upon actual cases, even where Titius and Maevius, the Roman John Doe and Richard Roe, replace the real parties. But the greater part are evidently answers to questions by learners, or solutions of hypothetical propositions. In the strings of such answers, set down probably by pupils, we can see that abrupt transitions might well occur, to which we have no clue. We must not therefore always expect a logical continuity, or be surprised at a sudden change of subject, even in the same extract. This is especially the case with the *Digesta* and *Responsa* of Q. Cervidius Scaevola.

Until the Imperial licensing system, of which I shall have to speak presently, the influence of any *responsum* cited to a *judex* depended merely upon its author's individual reputation (see above, p. 364) or upon its previous acceptance on discussion, either in contested suits or in the Schools[59]. No less weight appears to have been given to the one recognition than to the other: and it was not unnatural that, even with the licensed *prudentes*, the *occasion* of the *responsum* might ultimately come to be regarded as equally indifferent. I may therefore close this part of my subject by referring to Sir Henry Maine's observations on the peculiar advantage of a *scientific* developement of Law, such as this, when compared with that which depends solely upon actual cases[60].

Responsa eorum quibus permissum est jura condere. For my present purpose it is not necessary to discuss Augustus' introduction of the principle that *responsa* should be given "on his authority or guarantee," by specially privileged or licensed *prudentes*, nor the question who was the original grantor or grantee[61]. I shall begin with the time of Hadrian,

[59] The *disputatio fori* spoken of by Pomponius, Dig. 1. 2. 2. 5 (above, n. 26) has in fact been sometimes taken to include both. See however, Karlowa, i. 477, who confines this *disputatio* to the natural meaning of contested cases.

[60] Ancient Law, latter part of Chap. ii. See also P. J. p. 263.

[61] See P. J. pp. 294, 295.

under whom it seems clear that there was then, or was contemplated, a plurality of licensed *prudentes*, and that it was found desirable to define the authority of their *responsa*. A rescript of that Emperor, delivered with this object, is referred to by the well-known and difficult passage in Gaius' first book[62]; which possibly does not contain so much the immediate direction given by the rescript as its ultimate effect.

One thing is clear about the rescript that it immediately related only to opinions called forth by *actual cases*: whether it enacted that the opinion given, if unanimous, should form a precedent, depends upon whether the phrase *legis vicem obtinet* follows the words of the Emperor or not. For the expression *jura condere* does not, if we take into account its previous history, indicate an intended prospective effect, but only the general idea of forming or framing (see above, p. 362). On the other hand, if any reference to "statutory effect," (which does not seem very likely to have been interpolated), *did* occur in the rescript, I do not think that so remarkable an expression can have been meant to be confined to influence upon the individual decision. It is therefore submitted that what Hadrian enacted was: where a unanimous opinion of existing licensed *prudentes* has been obtained on a point of law in an actual case, that is to be settled law for the future. Whether such opinion was or was not to be in abstract form (see above, p. 371) does not clearly appear.

It was apparently his intention that *all* the existing *prudentes* who had the license should be consulted when any

[62] Gaius, 1. 7. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis vicem obtinet; si vero dissentiunt, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur.

official opinion was required or tendered[63]. Their unanimous opinion had therefore the same *effect* with an Imperial decision as generally stated by Gaius, the same expression *legis vicem obtinere* being used (see above, § 6, p. 335). How soon the principle of this rescript was extended to unanimity of single licensed *prudentes* advising on different but similar actual cases: how soon it may have been extended further to similar opinions given on hypothetical cases, we cannot say. Some such extensions must be presumed, not merely from the conflicts of opinion, about which we read under the later Emperors, with the attempts to remedy those conflicts by establishing scales of preference, but from the character of cases put, on which we have *responsa* recorded from jurists who, there is reason to believe, held the Imperial license.

These *responsa* were without doubt authoritatively issued, and appear to have been officially recorded and preserved, at least from the time of Hadrian. They fall rightly, in legal theory, under the designation of *jus scriptum*, as delivered *ex auctoritate principis*. Each was nominally a matter of *authentic Interpretation*, i.e. Interpretation by the supreme legislature; but in practice they must have come to be a number of conflicting or diversified opinions, with a respective prevalence due to the repute of specially eminent individuals, such as was the case with the later part of the *jus civile* (above, p. 364).

A still further deviation from what I conceive to have been the original intention of Hadrian is the admission, on an equal footing with the *responsum* proper, of *dicta* in a treatise or Text-book. Some have supposed that an authority was allowed to the works *in general* of the licensed *prudentes* from

[63] So Muirhead[2], 293: contra Krüger, Sources, 152. On the whole question of Hadrian's rescript and the meaning of *jura condere*, see Pomponius, Dig. 1. 2. 2. 49; P. J. pp. 290, 291, 293—295 and my Article on Papinian in Journal Soc. Comp. Leg. N. S. iv. (1902), 19—30.

the time of Hadrian if not of Augustus. This view does not seem reconcileable with the language of Gaius. But it is clear that, by the time of Constantine, a considerable persistent authority had been acquired not only by opinions delivered on actual or hypothetical cases, but by similar *dicta* in the works at large of the later Jurists who had belonged to the licensed class. The attempts at reconciling the conflicts to which I refer are matter of too much detail to be entered on here[64].

[64] See P. J. pp. 297, 298.

§ 8. JUS NON SCRIPTUM (MODERN)

GENERAL distinction from *jus scriptum*, pp. 377—380. Blackstone on English Common Law, 380—382. Criticism of his theory, 382, 383. An English *Auctoritas Prudentium*, 383, 384. Anglo-Saxon Law. *æ*, *domas*, 384, 385. Anglo-Norman Administration, 385—387. Early English Text-books, 387, 388. Glanville, 388—390. Bracton, 390, 391. Roman Law as affecting English, 392. Fleta, Britton, Plowden, Coke, 393, 394. The Year-Books, 394, 395. Case Law (English), 395—399. A Digest, 399—400. English Text-books, 400, 401. Case Law on the Continent, 401—403. Custom in Modern Law, 403—407. The paradox of unpopular Common Law, 407—411. The professional class as replacing the People, 412, 413.

General distinction from jus scriptum. The subject of this section is the modern—mainly the English—*jus non scriptum*. I must, however, briefly recapitulate the principal features of the other branch of Law, absence of which constitutes the *differentia* of this. They are, in order of importance, authoritative issue, general form, and publication. The first is an essential feature: everything known as *jus scriptum* was put forth by a supreme or subordinate political authority. As to the second, most of the recorded items of *jus scriptum* are obviously in the form of general rules. This *may* have been the case with the *responsa* of the licensed *prudentes*, as it certainly was the case with some of the Imperial *decreta*[1]. But others of these Imperial *decreta*, which were equally to have statutory force, were, apparently, in form, simply judgements on the individual

[1] See § 6, pp. 335, 336; § 7, pp. 372, 374.

case or point. These last ought to be classed with our English judgements, at least with such as are finally settled by the highest or ultimate Court of Appeal.

Leaving for a moment the question of publication, we see that the Roman *jus scriptum* with the exception of the last-mentioned Imperial *decreta* corresponds to English Statutory Law, if we use that term, with Austin, as extended to all general rules issued by a political authority with legislative powers, whether supreme or subordinate (e.g. Courts, Boards, Councils, &c.), and not confined, as by Blackstone, to Acts of Parliament. The multiplication of judicial legislative Sources is material as a question of political expediency (see § 4, pp. 192, 193), but immaterial as one of Mode or Form.

Publication of *jus scriptum*, or Statutory Law in the wide sense, must obviously, before the invention of printing, have been with any but very small States, rather a nominal affair. I may refer to Section 6 for the various degrees of actual publicity given to the Statutory Law of Rome, from its being a possible reality with the earlier *Leges* and *Plebiscita* to the later posting up of Edicts, and that of certain Imperial Decisions in a capital or chief town (§ 6, pp. 326, 328, 336). Not even the last amount of publication can, as far as I know, be traced in the case of *responsa* by the licensed *prudentes*.

In our modern times, the coming into effect of new Statute Law, is often made to depend upon its previous publication or *promulgation*, the latter term being used, as under the Roman Empire, simply in the sense of *publication*, which was not in its proper meaning in the Republic[2].

Copies, whether of Statute proper or Statutory Law in the wide sense, are now capable of indefinite multiplication, widespread posting, and sale at a cheap rate. The ordinary citizen, therefore, may, by some amount of exertion and

[2] See above, § 6, p. 318: also P. J. pp. 213, 269.

self-denial, acquaint himself with the new enactments or orders which are to regulate, *pro tanto*, his conduct and transactions. Moreover, Blackstone's theory of English Statutes being "promulgated" through the assumed presence in Parliament of "every man in England," by his representatives, is not now quite so absurd, either for England or elsewhere, as it was in the time of Austin[3]. Besides the great extension of franchise, there is to be taken into account the public discussion necessarily aroused by the proposal of any considerable statutory innovation, so that the main principles of the proposed law really come to be pretty generally known before it comes into effect. But of course this does not apply to the previously existing mass of *jus scriptum* or to the unavoidable accompaniment of Case and Text-book Law which are sure to supervene on any Codification however temporarily complete. On the question of Codification as a means to the general *cognoscibility* of Law, for which it was intended by its first modern originator, I do not now propose to enter. It is doubtful whether that object can be attained by any system of Statutes, which must enter into considerable, and occasionally very technical, detail, if they are not to cause endless litigation. At present I pass to consider the items and features of the modern *jus non scriptum* in an uncodified form, mainly as illustrated by English legal history and practice.

I have endeavoured to shew, in speaking of the Roman *prudentes*, how the old *Jus Quiritarium* was most probably differentiated out of National Morality and Custom, through Practice, in the administration of Justice, and by what agency it was preserved and transmitted: how again that old Law, after partial Codification, was in points supplemented and modified by direct legislation, but to a much greater extent by the generalisations and suggestions of a

[3] See Austin[5], 29. 526 on Blackstone, 1. 2, p. 185, and generally P. J. p. 212.

professional class. Much of this process finds a parallel in the history of English Law coming under the *non-scriptum* division; to the pertinent facts of which I would now call attention, after a few additional remarks upon the theory of our Institutionalists briefly stated in the preceding section (p. 349).

Blackstone on English Common Law. The theory in question does not, it must be remarked extend to Equity, in the English sense of a division of Law, but only to Common Law. The reason is that Equity in this sense was obviously the creature of Practice in an existing Court, to which its commencement could be definitely ascribed, whereas with the older Common Law there was no such obstacle in the way of its original attribution to National Custom, or "long and immemorial usage," however it might have passed or be supposed to have passed through intermediate, but obsolete, codifications[4].

Blackstone's Common Law, then, is English non-Statutory Law (Statute being taken in the strict sense) other than Equity. Its *style* he explains by the supposed original consolidation, under our pre-Norman kings, of "several provincial customs and particular laws." "Common Law" has several meanings, varying according to its particular *antitheton*: for the origin of the *expression, general* as distinguished from *local* is perhaps the most favoured explanation, though I think there is still something to be said for *law* (or *right*) *common to all the people* as distinguished from the *laws for particular classes*[5].

[4] Blackstone, Int. § 3, pp. 66, 67. Recent research has successfully questioned both the authenticity and the antiquity of these consolidations. On the *Leges Edwardi Confessoris*, and the precursors of that work, a little was said in P. J. pp. 71, 72. See now P. and M. i. 75—83 and Liebermann's Prefaces. On the *dom-bocs* generally, below, pp. 384, 385.

[5] See P. J. pp. 72—74, notes 62, 67, &c. Also P. and M. i. 155, 156: and below, n. 14.

As regards its *contents*, however, Blackstone's Common Law includes not only Customs *general* but also such as are *particular*, in the sense of *local*, and particular or, as he prefers to say elsewhere, *peculiar* laws or legal systems which are customarily used in certain peculiar Courts and Jurisdictions. As has been intimated above (§ 7, p. 345), the principle involved in the theory of customary law would appear to be the same, as to the "reception and usage" required, whether the Customs are general or local, though special canons as to the character and evidence of the custom may be observed in the latter case[6].

The Civil (Roman Imperial) and Canon (Papal) Law, which are described by Blackstone as peculiar, stood, in medieval England, on a different footing from one another. The latter had once a recognised authority, within its sphere, coordinate with or superior to that of the English Sovereign and Law, which the former had not: this foreign authority was abolished by Henry 8[7]. As to the present existence of both, in relation to our English legal system, Civil and Canon Law must be regarded, for the purposes of Jurisprudence, as bodies of foreign Statutory Law, adopted to a very limited extent, by our legislature and by the practice of certain of our Courts[8]. In speaking of them I may remark

[6] I therefore omit here what is said by Blackstone (Int. § 3, pp. 75—79) on *particular* customs with Austin's comments (30. 534—536) and the quotations from Coke, Hale, &c. in P. J. pp. 318—320. The subject will be considered below, pp. 403—406.

[7] See Maitland (Canon Law in the Church of England) for the original treatment of Canon Law as absolutely binding in our Courts Christian, p. 2, &c.: for the effects of Henry's legislation, pp. 91, 92. Any intention, however, to exalt Civil as against *Common* Law (by the institution of Readerships) must I think have been confined to the sphere of foreign and diplomatic service (see Mullinger, Univ. Camb. ii. 127, 133): although a competence for Ecclesiastical Jurisdiction is conferred on Doctors of the Faculty by 37 Hen. 8, c. 17.

[8] "I take that part only of the foreign Law to be the Ecclesiastical Law of England which has been adopted by Parliament or the Courts of this

that Blackstone shews some appreciation of the real juridical meaning of *written* and *unwritten* when he describes them, in England, as *unwritten* law, deriving their force from immemorial custom and usage *although set forth by authority* elsewhere[9].

It is not difficult to shew that the theory of English Common Law being founded on immemorial usage and only evidenced by judicial decisions (§ 7, p. 349) will not hold water as an exhaustive definition. We need not spend too much time on Austin's individual applications of his favourite method—*reductio ad absurdum*—to Blackstone: but they may serve to suggest views more in accordance with actual fact, which indeed are not infrequently well put even by Blackstone's predecessor Hale.

To hold, for instance, that all judiciary law administered by the Common Law Judges (except what they have made upon Statute) is immemorial customary law[10], would be obviously absurd. Much of that law is clearly based upon customs or usage which is quite recent (see below, pp. 405, 406), or proceeds on the recognition of changed and changing conditions of modern Society. I may refer to what was said above on Hale's "reason of the thing," and Professor Lefroy's "Sources of Case Law" (§ 3, pp. 105, 127).

An adequate conception of the grounds of judicial decision, and what are in effect the legislative functions of a judiciary will also fairly answer the only strong point in the following argument, which may be found in the same passages of Austin last quoted.

If Customary Law, we are told, exists as positive Law by force of immemorial usage, *all* customs immemorially current would be legally binding without recognition by any Court:

Country." Lord Abinger in Queen *v.* Willis, 10 Cl. and Fin. p. 745, cited in last edn. of Phillimore's Ecclesiastical Law, p. 16.

[9] Blackstone, Int. § 3, p. 79.

[10] Austin[5], 30. 539; St. 270.

and moreover such customs could not be abolished without the consent of its imaginary founders.

The latter part of this argument—that a rule established by custom could *only* be abolished by custom—seems to me a pure assumption. The *fact* of customs being abolished by legislation is, I apprehend, within the experience of all countries which have arrived at the possession of a regular legislature.

With regard to the *reductio ad absurdum*, the necessity for a *differentiation* into Law among any rules of national custom and morality, immemorial or not, has been repeatedly admitted above and distinctly attributed to the Administration of Justice: the fault in Austin's origination of such law being his ignoring its "material source" by an exclusive reference to Sovereign Command[11].

There is more weight in a third argument of Austin against introduction of Customary Law by the *consensus utentium*—an argument based upon what may be termed "the paradox of unpopular Common Law."

If Customary Law were really so introduced, he urges, it would be necessarily in accordance with the interests and wishes of the people; whereas it is often the reverse[12].

A general consideration of this paradox is perhaps better postponed to the end of the section, as much light is thrown upon it by the history of our English Common Law. To that subject we may pass, after briefly mentioning first a new element admitted by Blackstone to enter into the formation of that Law.

An English Auctoritas Prudentium. The phrase, here borrowed from Roman juristic phraseology, is not used by our own Institutionalist, but may serve to express an important

[11] Above, § 2, pp. 82, 84. See too Salmond[2], pp. 156, 157.

[12] Austin[5], 30. 542, 543; St. 272, 273.

corollary to his definition of Common Law as Ancient Custom "evidenced" by judicial decisions.

A class of authors is recognised by him, ranging from Glanville to Coke, "whose treatises are cited as authority and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles[13]." Upon this stage of developement, from presumed individual judgements to authoritative generalisation in a Text-book I shall have to speak directly below (p. 393), but must first go back for a moment to earlier times and forms.

Anglo-Saxon Law. æ, domas. Some of our early Common Law is to be explained and understood by reference to Anglo-Saxon Custom and enactment, but it is in the main deducible immediately from the practice of the Anglo-Norman Courts. Those earlier records, however, which genuinely belong to the pre-Norman time, are interesting on the one hand as proofs of Law originating in national custom connected with the administration of justice; on the other as recording what are called "judgements" in the generalised form of a prospective rule rather than in the individual form of a precedent.

According to the derivation more generally accepted, the earliest name for Law in these documents (*æ*) means immemorial custom: there is also however a somewhat recent derivation of the word, according to which *æ*, in its archaic form *æw* is cognate not with the Latin *aevum* but with *aequum* in the sense of *just* (see above, § 3, p. 111). As to *dom*, it may be fairly contended that the word, which no doubt comes to mean *ordinance*, did originally and properly signify *judgement*: and it is obvious that the oldest *domas* are scheduled applications of a general principle of pecuniary amends,

[13] Blackstone, Int. § 3, p. 73. See below, p. 393.

originally for personal injuries[14]. Some of them find an interesting parallel in the archaic treatment of *injuriae* by the Twelve Tables; which last, it may be noted, still retain an ultimate possibility of the barbarous *talio* (eye for eye, tooth for tooth) which had become obsolete apparently (see P. and M. i. 24) in the Germanic nations as we know them.

The *doom-books* of the pre-Norman Kings were, in their original intention, directions for the administration of justice and, in their earliest form, consist mainly, as has been intimated, of specified compensations for personal wrong. But these specifications very soon pass into, or are accompanied by, more general Statutory enactments, addressed practically to the people at large, and bearing, besides the style of *dooms*, that of *ordinances* or *resolutions* (*asetnisse*, *gerædnisse*). All are in form, Statute; but great part, particularly in the earlier times, assume and refer to popular Custom.

Anglo-Norman Administration. After the Norman

[14] I have looked through the passages cited in P. J. pp. 62—65, with Liebermann's Wörterbuch to the Anglo-Saxon laws. *Æ* he translates Recht: in the Prologue to Ine (i. p. 89) Gewohnheitsrecht. In the only early passage which makes against the meaning of Customary Law (Hlother and Eadric, i. p. 9, *æ tha the heora aldoras ær gewohrten*) he does however translate *gewohrten* by *gebildet* hatten, *framed* rather than *wrought*. I have given in P. J. p. 62, n. 13, my authority for preferring the sense *observed* or *practised*. *Cristes æ*, in Alf. Int. 49. 1 (Liebermann, i. p. 42), is too general to be set against this meaning. In Ine 1. 1 (id. i. p. 88), where *ealles folces æ* and *domas* are coupled, I believe the former to be *all people's* (i.e. common) Customary law; see above p. 380. Kluge, s.v. *Ehe*, rather connects *æ* and *aew* with the root of *aequus*, but considers connexion with Skt. *êva=progress*, *custom*, possible. As to *dom*, I do not feel certain whether *Urtheil* or *Gesetz* is considered by Liebermann to be the primary meaning. The connexion with *deman*, certainly, and the earliest usages, seem in favour of the former: Liebermann I think prefers the latter (cf. the order of meanings accepted for *δίκη* in P. J. pp. 50, 51). Of course the meaning of *ordinance* must be admitted quite early, e.g. in Wihtræd's *domas* Prol. (suspected by both Kemble and Schmid). In this passage Liebermann agrees with my rendering P. J. p. 63, n. 14, that the *domas* are "added to the right Customs of the Kentish men," i. 121 and Wörterbuch s.v. [*ie*]*can*.

Conquest, the whole mass of Customs and Ordinances, general or local, which was recognised and administered before, came to be known as the "law of King Edward," the Confessor, (*laga regis Edwardi*), under which style it was "restored" by Henry 1, after admitted previous "oppression through unjust exactions," to his people. The style is worthy remark; for it is misrepresented by that of *leges* (or *lex*) *Edwardi Confessoris*, the title given to a very mixed private compilation written after the death of Rufus, and little to be trusted as an authority. The derivational connexion of *lagu*, and its plural *laga* or *lage*, with *lex*, if any, is of the remotest (see above, § 5, p. 304). The former have the distinctly intransitive meaning of that which *lies* or *rests*, and would naturally indicate a subject, as between the two, rather matter of Custom than of Ordinance[15]. It is indeed not improbable that the whole of the matter in question was so regarded by the Norman Administration, although the express statement, in the *leges Edwardi*, of a solemn ascertainment of national custom, by the Conqueror, is not now deemed worthy of credence[16].

In genuine documents of the reign of Henry 2, such as the Assize of Clarendon 1166 A.D., we find clear reference to the old Customary Law of the earliest Saxon days, and in the *Constitutiones*, two years earlier, an express recognition of a certain part of customs, liberties and dignities, &c., which ought to be maintained and observed in the Kingdom[17]; but there is no indication of any intention to codify the substantive law or custom; and it is from this time that we may begin

[15] For Henry's "restoration" see Stubbs, Select Charters[8], p. 101 (Charter of Liberties, § 11). For *lagu*, *laga*, etc. P. J. pp. 67—70. For the *leges Edwardi Confessoris* P. and M. i. 81, also Schmid[2], *Gesetze der Angelsachsen*, Appendix xxii. pp. 491—519.

[16] P. and M. i. 82, n. 1. See, however, Stubbs[6], i. 291.

[17] Stubbs, C. H.[6] i. 502, 507 and Select Charters[8], pp. 138, 140. Looking at the Preface and the last sentence of the Constitutions, I think the customs &c. may be put a little too *personally* as "the King's customs" in P. and M. i. 116.

to date our present Common Law, as formed out of matter previously observed but transmuted through the practice of the King's Courts. For, however the basis of the Law may be English, it clearly suffered a vast change in many essential particulars through the Anglo-Norman administration of Justice[18].

This was an administration organised and, to a great extent, personally directed by one of the most just as well as the ablest among a series of powerful monarchs beginning with a Conqueror. But, as undoubtedly, even under such Kings as Henry 2, the interests of the individual Sovereign must more or less be represented by his appointees, a tendency, in the changes referred to, should be noted, which will help to solve one of the difficulties of Austin. I mean the paradox of a Common Law referable originally to National Custom or feeling, as basis, and yet being, in parts, either apparently or really against the interests of the majority of members of the State. This subject has been touched upon above (§ 3, p. 144) and will be briefly reconsidered at the end of the present section.

Early English Text-books. As to the *form* under which the Customs, or rather the Practice of the King's Court, grew into the Common Law of England we have more than one interesting parallel with the *jus non scriptum* of Rome. As to *basis*, however, or assumed basis, an obvious comparison which at first suggests itself might be rather misleading; between the Great Charter and the Twelve Tables. Both were perhaps originally intended to be rather a settlement of disputed points than a Code (see above, § 7, p. 356). But the substantial result of the Charter—that the King is and shall be below the Law[19]—had been already achieved, before

[18] See the whole of ch. 5 in Bk. ii. P. and M.

[19] P. and M. i. 152 where the important note 2 is also worthy of particular consideration.

the Decemviral legislation, at Rome, by the expulsion of the Royal Sovereign, the substitution of the Consulate, and the Valerian legislation or compact. The Twelve Tables, on the other hand, whatever their original intent, *are* a Code, if not so all-comprehensive a Code as they have been represented. It is on their clauses, therefore, that the developing practice and procedure are, at least nominally, founded, which, in our case, proceed from the King's Justice or the vague "Law of the Land[20]." So, in this brief notice of English Common Law with regard to its form and mode, we may omit the Great Charter and pass somewhat rapidly from the first to the second of our Text-books, dating Glanville at the end of Henry the 2nd's reign, and Bracton at the end of Henry the 3rd's.

Glanville. The treatise on the Laws and Customs of England attributed to Glanville and written about 1188 A.D. contains the more important, or more frequently employed, principles of law and forms of procedure then recognised in the King's Court. The expression of the chronicler Hoveden that the *leges quas Anglicanas vocamus* were *conditae* by Glanville undoubtedly refers to this treatise. I have also little doubt that *condere* is here used in the sense of *put together* or *frame* which is explained above (§ 7, p. 374), and does not mean either legislation or administration, but compilation[21]. It is distinctly the work of a text-book writer, not of a reporter, and individual decisions are not cited, though record of them was already beginning to be kept[22].

Besides the statement of general principles of Law, we have, in Glanville, a number of the Writs, or directions to inferior judicial and executive authorities, which practically

[20] *Lex terrae*, in the famous ch. 39 of the Charter, = Glanville's "*jus et consuetudo regni*." See the various passages quoted in P. and M. i. 154.

[21] I am obliged to differ slightly from the note 1 to P. and M. i. 142.

[22] P. and M. i. 135, 147, 148.

constitute the greater part of the legislation of the time[23]. In the Writs issuing from the King's Chancery may be seen a most interesting parallel to the growth of new law at Rome, through the engagements or promises of the Praetor[24]; the *tralaticious* or *perpetual* character of which, in the Edict (see § 6, p. 339), fairly corresponds to the Writ coming to be "issued as of course." That there is here no copying from the formulary system but an independent developement, I quite agree[25]: also that the *formula* sent down, as a whole, to the *judex*, does not resemble the Writ. But I must maintain that the Writ does very much resemble the specific *legis actio* which expressed the Plaintiff's claim (above, § 7, p. 360) and the Praetor's engagement "si quis...judicium dabo." In particular, the *actiones utiles* (although the old "*as if*" derivation must be given up for "*availability*") bear a resemblance, which has often been remarked, to the writs *de consimili casu* provided for by the Statute of Westminster 13 Ed. 1, 1285. (See Blackstone, iii. p. 52 referred to by Austin[5], 36. 615.) I cannot here go farther into the comparison of *actiones in factum* with "Actions on the case," or of *actiones fictitiae* with the fictions employed in pleadings before the Common Law Judges; in neither of which does the parallel hold so well as in that given above. (See however Spence's Equitable Jurisdiction, i. pp. 240, 244.) The "stiffness" of those Judges and the consequent developement of the separate Courts of Equity are matters rather for a history of English Law (see § 3, n. 48).

There is a very difficult and ungrammatical page in Glanville's Prologue partially copied by Bracton, but wisely omitted in entirety by the author of the Scotch "*Regiam*

[23] P. and M. i. 129, 149. "The whole of his book is, we may say, devoted to the law of actions," ib. 208.

[24] See above, § 6, p. 339; § 7, p. 369.

[25] P. and M. ii. 557.

Majestatem," which is treated with more notice, perhaps, than it deserves by the editor of Austin[26]. I venture to suggest the following as the upshot of what Glanville says: The king of course regards the laws and reasonable ancient customs of the kingdom: but it is still more to his credit that he avails himself of the counsel of his best jurists and judges. And there is no impropriety in speaking, of what I am about to reduce to writing, on Laws of England, though they may not be already written (? like the old Saxon Books and the Roman Law), because the Sovereign's pleasure *is* Law and has the force of Law[27]. That is, the Practice and Decisions of the King's Court count and are to count as high as any preceding Laws and Customs—which they did, in fact, transform into a practically new body of Law.

Bracton's de legibus et consuetudinibus Angliae was mainly written about the middle of the 13th century. This great book is an account, roughly classed under Roman Law headings, of the Law then administered in the King's Courts. As in the case of Glanville, we must note that no technical meaning of *Statute* or *written* Law is to be pressed in the word *leges* of the title: it would rather seem from some of the opening chapters[28], that *leges* means Common Law and *consuetudines* local custom. The great number of judicial decisions cited from the plea rolls of the King's Court, in this work, had always been remarkable: a still larger collection

[26] Glanville, Prol. Legibus namque...statuentes; Bracton, 1. 1. 2. Sed absurdum...approbatum; Austin[5], 29. 530, n. 36; St. 265, 266. The *actually* written *leges* to which he alludes may be the Roman Law, in which sense *jus scriptum* is used by Bracton's Note Book, 3, p. 243.

[27] See Just. Instt. 1. 2. 6. The first sentence of Glanville's Prologue is also an adaptation of that in the Proem to the Institutes. For a much modified acceptance of this supreme legislative power in the English King, and a curiously halting quotation of Just. 1. 2. 6, see Bracton, f. 107[a], and Maitland, "Bracton's Notebook," i. p. 4, n. 2.

[28] L. i. cap. 1, § 2; cap. 3, § 2.

appears in the Notebook discovered by Professor Vinogradoff and with great probability attributed to Bracton. In the admirable edition of this work by the late Professor Maitland, he justly calls attention to what may be termed Bracton's "case law," and contrasts his treatment of the subject, as unique, not only with the generalisations of Fleta, Britton and Littleton but with what was probably the common practice of his own age. "The judges, assisted by clerks on their way to become judges, would regard themselves as having an implicit knowledge of the *consuetudo curiae*, and would not feel bound to argue about past cases[29]." These words of Maitland may serve very fairly to describe the early growth of the Roman *jus Quiritarium* suggested above: except that the Pontiffs, being advisers or referees rather than judges, were still less likely to limit their generalisation by reference to individual decisions, with which they had not directly to do, and which do not appear to have been in any sense regularly recorded[30]. The English judgements, on the contrary, *were* enrolled, though in the barest form, very different from that of a modern Report.

But, after all, the great merit of Bracton's Book is not merely its basement upon recorded decisions and his reference to them as evidence of custom or practice, but its Text-book form, its definite plan and orderly arrangement. For these we may regard him as indebted to the Civilians, though his following of the Roman Institutional arrangement is rather by way of preface or exordium than substantial[31]. But our own debt to him lies in the fact that he took the pains to generalise, and gave us a readable book, like his great follower Blackstone, instead of "some beggarly collection of

[29] P. and M. i. 163; see, too, "Bracton's Notebook," i. p. 11.

[30] With the possible exception of the Centumviral Court, of which however we know too little. See § 7, p. 354.

[31] See P. and M. i. 187, 207.

annotated writs," or, I would venture to add, some inexplicable tangle of reported cases.

Roman Law as affecting English. Dr Holdsworth, in his very able and interesting account of the "reception of Roman Law" and how it ceased to affect England at the end of the 13th century (see however his note 7 to ii. 234 of his History of English Law), puts in strong distinction the developement of English Law by Cases, and of Continental Law by the *Communis opinio* of the profession or by the rulings of the superior Courts, e.g. in the way of *arrêts de règlement* as distinguished from *arrêts* or *Decreta* in individual cases (ib. 389, n. 3: see also above, § 6, pp. 331, 335). The Continental developement is attributable, he shews, not so much to the earlier Glossators, as to the Commentators, who created a positive body of legal doctrine from the text and the "gloss." Their work was synthetic, and they used the Roman Law and glosses to frame new rules of Law suited to the needs of the age. All this is admirably put, but I must confess that, on the justifiable ground, no doubt, of Bracton's profuse reference to Cases, the "synthetic" work of our own early legal sages, on *their* materials, has had scarce sufficient recognition, though, in the main, the difference of the two modes of developement holds good.

Salmond in an article on the Theory of Judicial Precedents (L. Q. R. xvi. 376) puts this difference in the forcible words "according to Roman Law, and the modern systems founded on it, a precedent has no more authority than a text-book. Both are instruments for the persuasion of a judge: neither is more." It is remarked, however, with justice by the editor that the importance of (individual) reported decisions has been for some time on the increase in France and Germany.

To return to the influence of the study of Roman Law on our early English. The substantive part of that Law entering into our Common Law, through the knowledge of

the former undoubtedly possessed by writers like Glanville and Bracton, is very small. Nor did the Renaissance Jurists of the 16th century, though they restored the purity of the Roman texts, do more than reinstate the study of Roman Law as useful for diplomatic and international, partly also for ecclesiastical, purposes. (See Holdsworth, l.c. p. 395; Maitland, English Law and Renaissance, p. 51; Mullinger, Hist. Univ. Cam. ii. 132, 133.)

It is not necessary for my present purpose to say much of the works bearing the names of Fleta and Britton. Like Bracton they are in Text-book form: unlike him they do not support their general statements by actual judgements, of which indeed Fleta in his preface professes to give an abridgement: on the other hand they incorporate the Statute Law which had come into existence after Bracton's time. According to Reeves, such authorities are rarely cited in early judicial decisions, reference being rather made to previous cases[32]. In the end, however, the series of treatises specified by Blackstone came, as he tells us, to be cited (e.g. by Coke) for original authorities, so that the rules or maxims contained in them might be regarded as direct statements of practice rather than as appeals to decisions, if any could be traced, which they practically superseded[33].

More is known now, or at least what is known is known more accurately, of the history of our Common Law, than was the case in Blackstone's time, thanks pre-eminently to the researches of Maitland. Earlier authorities on that subject agree broadly with Blackstone. Reeves finds the first regular Reporter in Plowden, who "gives faithfully both the arguments

[32] Reeves' History of English Law[2], ii. 11. p. 282; iv. 27. p. 186 (Finlason, ii. 171; iii. 198).

[33] See above, p. 384, n. 13. The names given are Glanville, Bracton, Britton, Fleta, Hengham, Littleton, Statham, Brooke, Fitzherbert and Staunforde.

in a case and the opinions of the several judges." Coke, to whom Blackstone principally refers, gives, as Reeves tells us, in many instances, his own view of the points of law resolved, rather than a Report of the Cases[34]. The remark appears to be a good deal based upon Coke's Preface to the Reports, in which he professes to observe the *verae actionum rationes*, and he undoubtedly adds notes of his own (e.g. in Porter's Case, i. 63), supported however mostly by reference to Cases. He professes in fact to vary his methods, though in general he certainly gives both decisions and pleadings in full.

Austin, who appears to have the same legal authorities in view, couples, with whatever abstractions and generalisations of previous material they might make, a certain amount of "illations upon existing Law" and "conclusions founded upon notions of general utility[35]," which were really new. There is to my mind very little of the latter element in these Fathers of Reporting: and the former does not often go much beyond the modern head-note. Some references however, upon which light has been thrown by the work of Maitland on the Year-Books, require a little separate consideration; as here the process of generalisation, in the way of maxims or *jura*, seems to have much resembled that in the earlier *jus civile* of Rome (see § 7, p. 362).

The Year-Books. It has generally been the custom to regard the Year-Books, which begin in the reign of Edward 1, as official Reports, and the introduction of such a system has been connected with the alleged publication of "Britton" by Royal Authority, and a general intention of reform or codification of Edward connected with the disgrace of the Justices in 1290[36].

[34] Reeves, v. pp. 241, 242; see too Sir F. Pollock's First book on Jurisprudence[2], p. 301. Of Coke's Preface, see pp. xxviii, xxix, ed. Fraser, 1826.

[35] See Austin[5], 30. 546; St. 275; also Coke's long note on "Maxime" in Co. Litt. 11[a].

[36] See Reeves[2], ii. 12. p. 357, and the various passages quoted in

It has been shewn by Maitland[37] to be highly probable that the Year-Books were rather collections of private notes made in Court with a view to future use in pleading. They undoubtedly contain, beside the mere formal proceedings, ideas drawn from the arguments used, and *notae* in the shape of general maxims. In this *disputatio fori*[38], then, we may perhaps recognise a practitioners' manufactory of new pleas and claims, devised to meet new legal exigencies—forms which might, on official approval, become practically Statute as Writs—or at least a generalisation of previous judgement and Practice such as furnished material to the Text-books less given to quoting individual cases, such as Fleta and Britton. To the regular later record of such cases I must now pass on, leaving the "Maxims" of our earlier Common Law with this final remark, that, whatever their original Source or Authority, they have mostly been, at one time or another, sufficiently recognised and sanctioned, to satisfy Austin's judiciary enactment, in modern decisions.

Case Law (English). From the time of Coke, or rather earlier[39], dates, in England, a system of Reporting which,

P. J. pp. 308—310. For Blackstone's circumstantial account of the report taken by the "prothonotaries" at the expense of the Crown, see Int. § 3, p. 72. A connexion with the King's efforts at reform is on the whole rejected by the editor of Y. B. Edward 20 and 21 (1291, 2) in the Rolls Series, Int. xi.

[37] In the Year-Book Series to have been edited by him for the Selden Society—a series unhappily cut short by his premature death. See Vol. i. Introduction, pp. xi—xiv, xvi, &c.

[38] See above, § 7, pp. 357, 373. On the question whether these results came entirely from the Courts, or partly also from the private disputations (*moots*) of the Hostels occupied by Apprentices of the Law, see Pulling's Order of the Coif, p. 152, n. 5, and Y. B. 29 Ed. 3, f. 47[b]. In an earlier Year-Book (33 Ed. 1, p. 65, R. S.) I find Hengham suggesting that some Apprentice has actually manufactured a case in order to make the Judges settle an untried point.

[39] Reeves (v. 34, p. 241) dates the practice from Plowden (1578). Pollock puts the commencement of regular modern reporting in the middle of the 18th century. See his First book of Jurisprudence[2], ch. 5, p. 302.

though unofficial and coloured perhaps at first, to some extent, by the reporter's own views, does purport to represent individual decisions as distinguished from general statements of professional practice or legal principle. By Case Law is here more particularly meant a system of precedents having an independent validity of their own, not merely operating as declarations or evidence of a previous Customary Law (above, p. 382 and § 7, p. 349). Such a system was for a considerable time peculiar to English and English-derived American Law but is certainly beginning to be recognised in Continental practice also.

A much larger amount of Law than the Statutory part (even when taken in the wide sense of *jus scriptum*, as above in § 6, p. 319) is contained, with many modern nations, either in Reports of Judicial decisions or in Text-books written by legal experts and based on legal practice. The English point of view (above, p. 392) is, as elsewhere, almost exclusively taken by Austin, who regards Statutory and Judiciary as an exhaustive division of Positive Law. That there are practically influential elements of Law, which cannot exactly be brought under the second head, has been already signified and will be shewn further on. Meanwhile it may be as well to remark that the distinction is one simply for the scientific law student (see above, § 1, pp. 20, 32). He who looks forward solely and immediately to Practice must take all the different Modes and Forms of Law-Statute, Case and Text-book—together, subordinate to the practitioner's only classification—by subject matter.

In the latter part of § 3 "Equity" and the like were treated as *grounds* of a judicial decision, and matter of principle or sentiment in the judge's mind. The subject here treated is the different one of the external effect or influence of a previous decision *per se* upon the subsequent administration of justice, and legal relations generally in cases similar to that

decided. The following, in a general way, of *precedents* seems almost unavoidably to be the result or condition of any permanent administration of justice. But their specific and definite binding character is recognised in very different degrees in different States and may vary in the same State according to the comparative rank or dignity of the Court from which the judgement proceeds.

Thus, in Rome, the binding effect, as precedent, of an individual decision appears to have been confined to those of the Emperor, or to *responsa* which may probably have been considered as equivalent to an Imperial decision[40].

In the English legal system, on the contrary, the decision of any Court will be regarded as an authoritative precedent by any other Court of co-ordinate authority. A superior Court can overrule a precedent from an inferior one, and the decisions of a Court of last resort are binding on all of lower rank, it being still a somewhat debated question whether such a Court shall regard itself as absolutely bound by its own. I do not refer in the above words, to the *reversal*, &c., of a particular judgement on appeal, but to the overruling or modification of its principle in some new case[41].

As to the *phraseology* of judicial decision, general propositions are still undoubtedly, in the main, avoided by our judges: if employed, they must, when applied to another case, be checked and limited, we are told, by the particular circumstances of the case which called them forth. This at least is the general upshot of Austin's statements or canons in Lectures 37 and 39. Most of the more important passages are collected in P. J. pp. 247, 248, but need not be reproduced here. Professor Salmond speaks to somewhat the same effect

[40] See above, § 6, p. 335, and § 7, p. 375.

[41] On the authority, in English Law, of decided cases as precedents, see Sir F. Pollock, Jurisprudence[2], ch. 6. Also Salmond's Theory of Judicial Practice, an excellent Article in L. Q. R. xvi. pp. 376—391.

in his paper referred to (note 41). "The only judicial principles which are authoritative are those which are required for the decision of the case, which are thus relevant in their subject matter and limited in their scope" (p. 388). I venture, however, to question whether our rule as to precedents really extends to the exclusion of statements of principle generally, or only of such as are truly and obviously *obiter dicta*. Austin's language to the former effect appears to me much too sweeping; and, moreover, where the Judge does refrain from putting into words the so-called *ratio decidendi*, i.e. the ground or principle on which a case which forms a true precedent is decided, he (Austin) seems much to exaggerate the difficulty and uncertainty of extricating it. I certainly recommend the student to omit the whole disquisition on the maxim *cessante ratione legis cessat lex ipsa*, to which Austin gives a very forced meaning, as well as on the "competition of opposite analogies[42]." The latter is no doubt a difficulty attaching to all bodies of Case Law, but requires little more than statement.

Any system which records individual judgements as precedents must accumulate minutely differing applications either of established principle or of growing and changing custom or popular feeling. The recognition of such growth and change in judicial record is the great merit of Case Law. But, on the other hand, such a record must have with regard to its use for practical purposes the grave faults of perplexing variety, scattered literary sources, and "incognoscible" bulk[43].

[42] See, or avoid, P. J. pp. 250—254, and the passages there quoted. See also above, § 3, p. 116, n. 52.

[43] Austin has many sensible remarks, at Notes, p. 1029 and elsewhere, on the difficulty of making our Law "cognoscible" even to the profession. See also P. J. pp. 260, 282. Sir F. Pollock (First book[2], p. 310) gives less weight to the *bulk*, which no doubt his Revised Edition of the Reports does materially diminish, than to the rapid changes in the way both of accession and obsolescence, and to the wide dispersion of materials.

How these faults are to be remedied or at least diminished is the problem of English Case Law, and of its copies so far as it is beginning to be copied by other nations, besides our own kith and kin in the British Empire and America.

In the elaborate judgements delivered by our higher Courts at the present day, we continually find very complete harmonies of previous decisions *in simili materiâ*. Whether these generalisations are theoretically admitted to be authoritative or not, it may fairly be expected that, in practice, they will replace the judgements on which they were founded almost as completely as is said to have been done by Blackstone's ancient authors (above, p. 384).

Besides these we have unauthoritative Digests, and Text-books by non-judicial experts—Digests which give, taken together, *all* the forms of Law (above, p. 396) on the particular subject in hand; Text-books which put the same materials into a more readable shape and consequently contain more of the connecting link and logical supplement due to the writer.

Some clearing away of the past accumulations might be hoped for, from the work of Digesters selected by high judicial authority, such as that of Lord Halsbury, in his Digest of the Laws of England. But it must be remembered that in England, as at Rome, the best professional writers may differ in their conclusions or generalisations; and that the original judgements are still in existence, and still, in our theory, the ultimate authority; so that they may yet be brought up as against a rule which has been deduced from the comparison of them, and has been so far admitted.

Whether we shall ever arrive at Justinian's heroic remedy of actually *forbidding* reference to previous authorities, may be doubted. But if such a consummation should be thought desirable it would certainly seem more likely to be attained by a Digest, of the comprehensive character projected by

Lord Halsbury, but authoritative, than by Codification, even supposing a better agency for that purpose to hand than, for instance, our present Parliament.

Any Digest will, of course, require periodic revision, to take in the new matter furnished by supervening judicial decisions whether in the way of addition or correction (above, p. 397), and by intermediate direct legislation. The possible agency by which such a work might be carried out, with authority, has been suggested in my Practical Jurisprudence, as also the relation which a Digest ought to bear, in point of priority if not of preference, to a Code[44]. I have nothing to add, except that my own predilections in favour of the former, as compared with the latter, method are much increased since those pages were written (see above, pp. 379, 399).

In advocating an authoritative Digest of our Law, I, of course, assume that its writers must confine themselves to the reproduction and arrangement of materials recognised as authoritative—old Common Law, Statute, and judicial decisions. But, undoubtedly, from a scientific point of view, we must needs recognise the objection which has been taken, in works on Jurisprudence, to the partial developement of principle by actual cases, and may naturally form to ourselves a more ideal system, having its *lacunae* filled up by patches of legislation, or, pending them, by the theory and logic of jurists, with a freer hand[45]. On this sort of supplementation by the Roman *prudentes*, as teachers of Law, and the apparent authority allowed to the *dicta* resulting from their scholastic

[44] P. J. pp. 389, 390, 393, 394.

[45] See the latter part of Maine's Ancient Law, ch. 2, and Pollock, Essays, pp. 67, 83, on Anomalies of legal developement. In his Essay on the Science of Case Law, the latter author suggests a possible reconciliation of conflicting decisions, in England, by reference, independent of the option of parties, to a Court of Appeal or Ministry of Justice. The fault in the Roman system (of *opinions* of jurists) was, he holds, the want of a final appeal (ib. pp. 243—245).

disputations, entirely irrespective of actual litigation, I have spoken above (§ 7, pp. 372, 373). In an English Text-book writer such suggestions might be regarded as useful hints for future legislation or judicial decision, but would be sharply divided from genuine generalisation confined to a comparison of authoritative sources. The specially important part played by the Text-book writer with regard to Constitutional and International Law, which will be more particularly referred to in the next section, depends mainly upon the wider amount and more diversified character of his materials, but partly too upon greater freedom of personal initiative.

So sharply marked a dividing line does not however appear to be observed in Continental Jurisprudence or Practice, where a principle of *logical* Interpretation, or *doctrinal* treatment of existing Law, by *jurists* (see above, § 3, pp. 121—124), is regarded as a form of developement, equally admissible with that growing regard for *judicial* precedents, of which I have next to speak.

Case Law on the Continent, at first sight somewhat of a misnomer, is nevertheless gradually obtaining a certain amount of recognition, though not yet in our definite form.

The prohibition in the Code Napoléon against delivering decisions in a "general or regulatory" mode, is in effect much the same as our own Judges' rule or practice as stated by Austin (above, pp. 397, 398). It repeated a law of 1790, which abolished the delivery by the Ancient Parliaments of *arrêts de règlement*, judgements which were at the same time general rules[46]. With regard to the effect of judgements in general as precedents, we have *Jurisprudence* defined by Aubry et

[46] Titre Préliminaire, Art. 5. On the *arrêts de règlement*, see Locrè, Esprit du Code Nap. (1805), t. 1, pp. 219, 220: more fully, Recueil complet des discours, &c. (1850). As to the question whether certain individual decisions of the Cour de Cassation do practically introduce some amount of *prospective* Law, see Sirey, Code Civil, t. 1, pp. 38, 39. This is by no means admitted in more recent French Jurisprudence. See however above, § 3, p. 120.

Rau as the total or upshot of a number of similar decisions on some question of Law. It is to be treated with due consideration but its rules are not obligatory on citizen or judge[47]. Professor Planiol, a more recent writer, goes so far as to represent *jurisprudence*, distinguished from *doctrine* (? = the generalisation of the Text-book writer) as deciding where the laws are silent, and filling up their *lacunae*. He speaks, indeed, of *règles jurisprudentielles* as gradually forming, since 1804, a considerable mass of Law. The *droit coutumier* of the present time consists, he says, partly of *Conventional usages* observed by the laity in *Contracts*, but partly also of this *jurisprudence*, which represents the influence of previous judgements. Nevertheless it is only an influence, not obligatory on judicial authorities, and so liable to modification from day to day, which in fact constitutes its great merit[48].

In modern German legal writing Savigny's divisions and Canons of Interpretation (see § 3, pp. 119—123) are often quoted and referred to as matter of definition, but the cognate ideas of Customary law and Judicial practice (*Gewohnheitsrecht, Gerichtspraxis*) have undergone considerable modification from the increased Codifying tendency[49].

The *Allgemeines Landrecht* of the Prussian States directly

[47] P. J. p. 224, n. 36. Aubry et Rau, Cours de droit civil Français, t. i. § 39 *bis*, pp. 128, 129 (4th ed.), L'ensemble des solutions plus ou moins concordantes données par les cours et tribunaux aux questions de droit que soulèvent les affaires qui leur sont soumises constitue ce que l'on appelle *hoc sensu, la jurisprudence*....La jurisprudence...a toujours joui en France d'une considération justement méritée. Mais, quelle que soit l'autorité qui s'y attache, et alors même qu'elle serait constante sur tel ou tel point de droit, elle ne forme jamais une règle juridiquement obligatoire pour les citoyens ou pour les tribunaux. See too ib. note (11), La jurisprudence la plus constante ne peut être considérée chez nous comme constituant un élément du Droit. Also Laurent, Principes de droit civil, t. i. § 280.

[48] Planiol, Traité élémentaire de droit civil, 4th ed. pp. 63, 64 and 67.

[49] See a general discussion of these subjects in Scherer's Bürgerliches Gesetzbuch, i. pp. 7, 8, §§ 8, 9.

prohibited Judges from making any reference to opinions of Law teachers or to earlier judgements (*Einleitung*, § 6), a similar prohibition being contained in the Austrian *Gesetzbuch* (*Einl.* § 12). But such a prohibition was not found tenable in practice, so that, in the end, even express statutory provisions came to be upset through decisions of the Supreme Courts. And at the present time, after the passing of the German Empire Code "the necessity of filling up *lacunae* and the need for a uniform application of Justice have given great authority to individual precedents (*Präjudizien*) of the higher Courts[50]."

Custom in Modern Law. From speaking of the Common Law of England as originally National Custom partially adopted and, *pro tanto*, turned into Law by Court Practice, we have passed on to the general subject of such part of our Modern Law as is due to individual judicial decisions. We have also seen that this last Source of Law has certainly begun to exist also in Continental Systems, either directly or through the instrumentality of professional writers.

Returning now to the subject of Custom or Usage in Modern Law, we find that certain Canons or Conditions have been laid down by English writers as to what is called its *Validity*. These Canons mostly refer to Customs which deviate from the Common or general Law, as being confined to particular localities or to particular classes of persons: but in part the same Canons are also applicable to Custom of the whole realm; and moreover they do not depend entirely on principles peculiar to English Law, but on such as are fairly matter of General Jurisprudence.

When we speak, in this connexion, of the *Validity* of Custom, we implicitly assume the fiction, as most moderns

[50] Dernburg, Das Bürg. Recht des Deutschen Reiches[3], i. pp. 83, 84. See Holzendorff's Rechtslexikon, iii. p. 117, Art. Präjudizien, on the influence of the decisions of the Supreme Gerichtshof.

consider it, acted upon by our older judges, that, apart from any judicial adoption, the Customs of the realm already were the Law of the realm. Or, to put it rather differently with Professor Salmond (see § 7, p. 350), that some Custom is already part of the Law, and *will be* recognised as Law, because it conforms to certain conditions. These conditions are, in the view here taken, reasons or motives for a distinction of the Customs to be legally enforced, from the rest—reasons which have been in certain cases formulated by Text-book writers or Judges under the following heads, amongst others.

The conditions of *certainty* and *continuity* are little more than matter of definition—they are essential to any idea of Custom at all[51].

Very long or *immemorial* duration is an indefinite qualification which will necessarily be interpreted in different ways by different legal systems and under different historical conditions. It is generally spoken of as confined, in its application, to *local* custom in England, but must surely have been, in fact, true of the general national customs recognised by the Anglo-Norman judges, as prevailing throughout the realm, equally with those which prevailed only in certain parts of it. The difference was that the old general customs prevailing through the realm, and the local customs of certain important parts of it, such as Kent and London, were matter of *universal* knowledge or notoriety, whereas, in other local customs, production of evidence, proving non-existence within certain limits of time, would be fatal to their reception. To growing bodies of modern custom, not *particular* in the *local* sense, like our Law Merchant of the present day, this condition has no application.

There is good ground for classing together (as they are classed by Pollock) the somewhat indefinite condition

[51] See Brown, p. 318, and F. A. Greer, L. Q. R. ix. 156. I would here acknowledge generally my obligations to this excellent article.

of *reasonableness* and that of presumed recognition of an *obligatory character*, in the Custom, which is called *opinio necessitatis*. The latter condition is generally explained to mean that the custom in question is regarded, by the community or body which observes it, as not optional or indifferent but as conferring or imposing legal rights and duties upon the persons concerned[52]. As cited by Karlowa (see above, § 3, p. 135) the same phrase appears to indicate rather the feeling of Right or Moral Obligation upon which the first rules of Law are based. In matters of pure Custom —morally indifferent—I can scarcely see to whom such an *opinio* can be attributed, except where the position of parties amounts to a sort of quasi-contractual relation. Taken in any wider application, the *opinio necessitatis* must, as it appears to me, be mainly that of the Judge, and the condition for efficacy comes to the same thing as the condition of *reasonableness*.

This last-named test seems somewhat paradoxically stated by Mr Greer (l.c. p. 156), to be not applicable to Customs General; perhaps it ought rather to be regarded, in that case, as a test which has been long passed, by universal consent. For claims still awaiting establishment, it may be generally taken as amounting to this—that the Custom must *not* be repugnant to any fundamental principle of Justice or Law[53]. Put positively, it is on the ground of reasonableness and confirmed usage that a modern Custom is recognised by our Judges and becomes part of our judiciary Law[54].

The English Law Merchant is rather loosely classed by Blackstone under the head of *particular*, by which he generally means *local*, custom. In their origin its rules seem to

[52] See Blackstone, Int. § 3, p. 78; Pollock, First Book of Jurisprudence[2], p. 266; Salmond[2], p. 147.

[53] Pollock, l.c. p. 264.

[54] See Brown, p. 323.

have been regarded—though the term is rather an anachronism—as a sort of Private International Law, based upon the customs of merchants from different countries. But such rules have long been adopted and modified by English Courts, and some of the more important parts in this branch of our Law, e.g. the law of Bills of Exchange—depend upon comparatively recent English decisions "ratifying the usages of merchants and traders in the different departments of trade[55]."

The recognition of modern Custom or Usage by Continental Courts must necessarily differ from that in our case, in proportion as the general principle of comprehensive Codification allows more or less of a loophole for unprovided cases. To take the two instances which have hitherto been mainly considered—France and Germany—French Jurisprudence and Practice would obviously allow the recognition, by a Judge, of reasonable custom, under his residuary power of deciding in accordance with "good sense and natural equity." The specific ground of such recognition might be put, as Salmond very well puts it, that reasonable expectation ought not to be disappointed[56].

In the case of Germany it is scarcely conceivable that some considerations of the same kind would not rightly be taken into account by a Judge, before whom claims or pleas dependent on some modern usage were brought for the first time. But the matter certainly seems to be left in some confusion, from the following circumstances:

(1) The original intention of the Legislature to abolish Custom, as a source of Law, altogether.

(2) Its readmission in practice as a legal factor.

[55] The words of Cockburn, C.J., in the leading case of Goodwin *v.* Robarts, Law Reports, 10 Exch. p. 346.

[56] See above, § 3, pp. 118, 121, and Salmond[2], p. 122.

(3) Its being coupled, or qualified, as such factor, with conditions of judicial, *or prudential*, recognition[57].

The latter would surely not seem sufficient guarantee alone. If dependence, on the other hand, is placed on the former, that must mean that the custom has at some time been brought before the eye of the Courts, as a bare fact, and judged, as modern Custom is with us (and presumably in France), on grounds of intrinsic reasonableness, confirmed usage of course, being assumed or proved.

The paradox of "unpopular" Common Law. The argument of Austin has been stated above (p. 383) that if Customary Law were introduced by the *consensus utentium* it would be in accordance with the interests and wishes of "the people"; whereas it is often the reverse. Now whether such Law is in accordance with the *interests* of its supposed enactors, depends no doubt, as Austin puts it, upon the amount of "enlightenment" possessed by them at the time of introduction, such amount being estimated according to the opinion of the writer for the time being or his generation. The question, which bears more truly upon the *consensus* theory, is that of accordance with the *wishes* or *feelings* of "the people": and both the answer to the question and the meaning of "the people" vary at different epochs in a nation's legal history.

It has been suggested above, more than once, that the origin of most old Law may be resolved into the Custom, and its sanction placed in the general feeling, of a Nascent Community. The determination of what particular Custom is, or shall be, Law is made by the individuals or bodies which we find declaring what is primeval, regular, or fitting before large Assemblies: and the Law thus differentiated consists of so much of the national usage as the national feeling will enforce or support the judiciary in enforcing.

[57] See above, § 3, pp. 123, 124; also Scherer cited in n. 49 of this section.

So far, the *consensus utentium* is an obvious fact: but a time comes when the general Assembly ceases to be the direct authority for enforceable Custom; and, in fact, ceases, as it must in any large association, to exist, except on rare special occasions. That developement of Sovereignty follows, which is essential to the formation of a State, though usually subsequent, on the view here maintained, to the developement of a Law properly so called. Sovereignty, in course of time, not by any means at once, developes an original power of direct legislation. But besides, as before, this, there is growing up, all along, a new sort of custom, the practice of the administrators of justice, with their recorders or advisers—of the "professional class," as we may by anticipation call them.

The old law arising directly out of National Custom or Feeling—*jus moribus constitutum*—passes henceforth more definitely through the stage of *jus a prudentibus compositum*, the phrase being taken in a wide sense requiring a little definite explanation. On the one hand *jus* must be taken to include judicial decision with all its results, and generally Court Practice, as well as the original National Custom: on the other, it should be remembered that *compositum* does not mean so much *devised* or *originated* as *put into form* (see § 7, p. 344).

The professional class as replacing "the people." According to Savigny's theory, of *usual* Interpretation being practically *professional* Interpretation, the professional class are taken to represent "the people"; "the people" here meaning, as I understand him, the whole of the community[58]. Such representation, however, though fairly true in the prehistoric beginnings of Law just referred to, is seldom so even in the first stage of an established State. By this time

[58] See System, i. § 25, p. 148; also the passages quoted above, § 3, nn. 68, 82.

the persons actually represented by the class, which differentiates Custom or Practice into Law, are usually some dominant part or caste, or some individual Sovereign, rather than the People at large.

As an illustration of this non-representation of the greater number, Austin cites, amongst other instances, the despotic power of the *patres familias* at Rome. It is not a very good instance, for, in this typical form of early society generally, the subordinate members of the family can scarcely be counted as entering individually into the number of the People at all. A better illustration might be drawn from the earlier customary Law of the Roman Republic, in its political supremacy of the patrician Order, and also in its extreme severity upon the poor debtor, even as regulated and modified by the Decemviral Code. Later, indeed, after the political equalisation of the Orders, followed by the disclosures of Flavius and the *publica professio* of Coruncanius (see § 7, pp. 360, 361), the teachers and students of Law might fairly be regarded as representing the People, i.e. the citizens independent of Order. Then, the developement of Law, becoming a career simply *ouverte aux talents*, naturally took, in practice, the line of general utility, and particularly, as in the world's mart, that of business convenience. Towards the close of the republican period, we find the Praetors, the organs of a professional developement of Law, showing and expressing deference to the principle of Equity, that is reasonableness and, to a certain extent, humanity. This was not so much, however, a representation of the people, as of the more enlightened minds, the philosophising lawyers with their ideal of a Natural or World's law (see § 1, p. 27). The World, so far as its actual Laws have been influenced by the Roman, owes a great deal to this ideal; which continues to exercise its power down to the end, when the pure and nervous diction of its originators had been long supplanted

by the bombastic language of the Imperial Court. But there is of course no longer any actual case of custom becoming Law as in accordance with the interests or wishes of the people (see above, p. 408): except perhaps in the case of local custom, as confirmed by judicial decision (see § 6, p. 333).

In England, as we have seen (above, p. 387), the greater part of our Customary Law comes from the practice of the Anglo-Norman Courts. It is not, therefore, necessary to go back and consider how and how far the earlier rules, which can be attributed to Custom, had already deviated, under political and economical influence, from regard either to the interest or feeling of the numerical majority. Starting, as we must mainly do, from the Conquest, what we should expect from professional practice would be a decided leaning towards the interests of the dominant race, or rather perhaps to those of a powerful and able line of individual Sovereigns.

As a matter of fact these interests not infrequently conflicted, to the benefit, in the end, of the subordinate majority, and the improvement even of the old Law, or so much of it as was "restored" by their conquerors (above, p. 386). But there is undoubtedly enough in our early Common Law, as in that of the earlier Saxon Kingdom, which has passed sufficiently far from any popular administration of justice amply to account for Austin's paradox (above, p. 407). And the Law growing out of the administration and practice of Henry the 2nd's Courts and onwards owed whatever accordance it may have had with the interests or feelings of the majority, not to those interests and feelings, but to the learning and on the whole the good intentions of the lawyer class, including the judges.

A few notorious cases of judicial iniquity are recorded by historians: but all that we read in the notes of Bracton and of the Year-books testifies to the general regard shewn by

the Courts, not merely professedly but really, for what was right and reasonable, honourable and conscientious[59]. It is rather when we come to later English history that we find attempts successfully made to employ the administration of justice as an instrument of despotism. This danger is considered to have been met by the rule of irremovability during good pleasure and the consequent independence of our Judges (see above, § 4, p. 174). We take all this as a matter of past history: but a similar modern danger from a new degree of despotism, exercisable by Party Government, may be apprehended if and where the system of "the spoils to the victors" comes to be applied to judicial appointments. Even in the crowning eminence of a Bench respected through the whole world, our own practice has not gone free from question, as to the wisdom of appointment to the Lord Chancellorship being dependent on a change of Ministry.

The cases of Unpopular Common Law intended by Austin date from past times when the numerical majority of what are sometimes called the "lower orders" had either no share of political power at all, or very much less than they have now. Their influence, at present, is somewhat remote on the appointment to judicial position. But, as to the formation of non-statutory Law which is still going on, under the operations of the professional class generally, it may be worth while to enquire how far Savigny's theory (above, p. 408) is true; in other words, what is, and has been, the professional representation of a "popular morality" or "common conscience," to which reference has been made above (e.g. § 3, pp. 101—106), as the foundation of much judicial legislation.

From the varying histories and circumstances of modern civilised nations, the amount of "enlightenment," as of political power, possessed by the mass of the population will

[59] See § 3, pp. 126, 141, and generally the passages quoted in P. J. pp. 373—375, on "English Equity."

not, of course, be the same in each particular case. Nevertheless, as bearing upon that part of the Law which is now being made, more every day, by the recorded decisions and practice of Courts thus much is, I think, generally true.

With the exception of the peculiar and objectionable *droit administratif* mentioned above (§ 4, p. 194), distinctions of Class and Order, under the administration of Justice, have mostly disappeared from the modern Political Society, which may be justly called, in point at least of administration, Isonomous. Accordingly, so far as, being the prominent actor in the professional Class, the Judge is the practical originator of new Law, he is generally assumed to be the spokesman of the higher average of good sense, justice and humanity prevalent in the community. This, I venture to hope, is not only the fact, but is actually understood to be the fact, by the population at large. That there are particular questions on which certain organisations of Labour have regarded Judicial decisions, equally with laws on which they have been founded, as inimical to their own interests, is true. It is also true that there are a considerable number of members of the modern Political Society, who do not admit certain principles generally regarded as fundamental—the recognition, for instance, of private property—without which it is, to others, difficult to form a definite idea of Justice at all. Of the latter class it is impossible to take account in any work which treats of existing law: in the former case, the objections taken have not been so much, I think, against partial administration as against the laws in question themselves; the justice or injustice of which, and the necessity, or otherwise, of altering them, is a question of politics or political equilibrium, which has been rather separately considered in the last part of section 4. In the main, allowance being made for some natural prejudice of the poor, against a profession necessarily requiring a certain proportion of more

means and leisure for the simple purpose of study and preparation, the Judiciary, and the professsion which acts under them, *may*, in the ordinary modern Isonomous State, be not unfairly regarded as representing the community at large, in appreciation of Right and Justice and consequent "promotion" of Law[60]. Of the functions of the Text-book writer, in the same direction, I have to speak in the following section.

[60] See § 7, p. 358.

§ 9. TEXT-BOOK WRITERS

FUNCTION of Judgement and Practice, p. 414. Of Text-book writers: 1. On ordinary Law, 415—417. 2. On Constitutional Law: English and Roman, 417—420. On International Law, 420—423. Deficiencies of the last, and attempts to supply them, 423—428. Style of International Law, 428—430. Public and Private International Law, 431, 432.

Function of Judgement and Practice. An ultimate origin of Law in common feelings of Morality and common lines of convenience—two different things often confused under the single name of Custom (see § 3, pp. 129, 133)—is a matter not merely of history or of philosophical theory, but deserving of consideration in a practical view of modern facts. Austin's definition of all Law as dependent on Command, true as far as Statute is concerned, is, I have endeavoured to shew, for all other law, inadequate, both with regard to material and to agency of formation (§ 2, pp. 82, 85). In England, no doubt, most of our old Common Law, other than Constitutional, *has* become absorbed in statutory rules or enshrined in ancient judgements. Modern branches, like the Law Merchant, which are admittedly still growing out of Custom or Usage[1], must pass, as I believe the greater part of all non-statutory Law at some time does, through the medium of Court Practice, if not of Judicial decision. In fact, while we demur to a bald statement of Austinian dogma, that the Judge makes

[1] The latter word is suggested by Pollock as a *distinctive* style for modern Custom: I have generally used it simply as an alternative term. For the following statement see § 8, p. 406.

the Law as the Sovereign's delegate, we must admit that in England it is the Judge mostly who turns the previous rule of common feeling or Custom into Law.

Of Text-book writers. 1. On ordinary Law. A little, indeed, of our oldest ordinary Law can with difficulty be referred to anything but the *dicta* of treatises, handed down from author to author. But, with regard to our modern Text-book writers, on this subject of ordinary Law, any claim of authority must be kept well within the limits of matter strictly deducible from actual judgements; and, even within those limits, their work can only be regarded, in orthodox theory, as an index to the real authorities. Their function is mainly confined to the task of putting the results of decided cases into a more intelligible general form. As to filling up the interstices of Case Law, their influence, unlike what appears to have been the case with the later and licensed Roman jurists, is mere suggestion (cf. § 7, p. 373 with p. 375). In many continental systems, on the contrary, where the English rule of judicial precedents, though gaining ground, is still not definitely recognised, juristic doctrine and literature stands on quite as high a level, as it did in Roman Law, if not on a higher.

And, however English theory and practice may differ from that obtaining among nations of a different stock and legal tradition, as to the weight of the Text-book writer in ordinary Law, we shall find him necessarily playing a considerable part in the formulation of two classes of rules, the exclusion of which from Austin's rigid category is, to many minds, highly objectionable. I refer to such part of non-statutory Constitutional Law as cannot well, by the nature of the case, come under Court Practice or Judicial decision (see above, § 4, pp. 249, 257), and to International Law in general, pending the establishment of an efficient common tribunal. But, before leaving the subject of ordinary Law,

as beholden to Text-book writers, I must not omit to notice another function of theirs, which is of special interest to legal education.

In the somewhat chaotic accumulation of matter described above (§ 8, p. 399) as existing in the English system, and possibly approaching in others, Text-books must be the main Source, if not of Law, at any rate of knowledge of Law, to the laity generally, and often to the first-hand legal advisers of the laity. With regard to the Law student, we hear much said as to the necessity, or advisability, of bringing him up directly, and almost exclusively, on cases; so as to shew him that the rules and principles put before him are realities, and not mere philosophical abstractions, by direct illustration from actual life. With the object expressed in the latter words I thoroughly agree, and have endeavoured to shew above (§ 1, pp. 35—39) how it may be attained, in the higher and more scientific study of Law, which includes Jurisprudence, by the reading *pari passu* of Roman Law i.e. the Institutes coupled with some portion of the Digest. And, as to the study of all Law, on the question of beginning with cases, I may be permitted to quote words, which fairly express my own opinion, from a recent article by Mr G. C. Austin, when speaking of the method adopted by the late Professor Dwight of Columbia College, as distinguished from that which seems, on the whole, more popular in the American law schools. "In the Harvard or Case System, the student is compelled, at the very outset, to *assume* (italics mine) the advanced position of a Text-book writer or a legal theorist, and to gradually emerge from the haze of confused authorities, with the uncertain light of an evolved principle" whereas "the Dwight method of legal instruction proceeds upon the natural method of comprehending great principles, and then, by a process of deduction applying them to specific cases[2]."

[2] L. Q. R. ix. p. 177.

Agreeing in substance with the latter method, I submit that a primary statement of fundamental or pervading principles in Law need not by any means possess the aridity and apparent meaninglessness chargeable, no doubt, against some isolated axioms of mathematics, &c., with which they have been compared; on the other hand, statements of principle, whether in Jurisprudence or Law generally, which he must mainly owe to the Text-book writer, are invaluable to the Student, though, of course, they should be illustrated and tested, as early as possible, by actual cases.

Enough, however, has been said of the services of the Text-book writer generally. Of the *arrangement* of a Corpus Juris for study, which is also the work of this class, I shall have to speak more particularly in the following sections. I now pass to the particular branches of Law, in which the Text-book writer bears a still more substantive part

2. **On Constitutional Law,** cf. p. 414. We have seen that the rules of Constitutional Law, even when "written" are, apart from direct legislative change, found subject in fact to Interpretation and practical modification by judicial decision or otherwise (see § 4, pp. 197, 239, 251, 264). In our own country, a comparatively small amount of such Law is referable to Statute, the greater part consisting of Case Law, Parliamentary Practice and National usage, which last elements enter, to some extent, into all Law of the kind. These elements are not moreover, in all points, *capable* of undergoing the same process as the customary part of ordinary Law does of recognition and differentiation by a Judiciary. For there are, as we have seen, in the case of all constitutions, Laws or "Conventions," on very fundamental points, which cannot, in the nature of things, be directly enforced by Courts of Justice, or settled by Judicial decision (see § 4, pp. 257, 258). These Conventions are the result of a combination of such sources or materials

as above mentioned with the pertinent facts in the political history of the particular State, put together and interpreted, for the most part, solely by Text-book writers of "authority," in the vague sense of general respect and acceptation. The proper function of these writers, and a most important one, is to make a consistent and unbiassed statement of past usage, enactment or expressed public opinion; keeping any "Interpretation," by reference to present or future utility, distinctly apart: taking into account of course any re-reading of history due to later research, but not, even then, so as to ignore past practice based on what may have been a previous misconception.

It would, no doubt, be both unreasonable and impolitic to take no notice of a present trend of general opinion in the way of proposed reform: but the greatest value and practical authority of Text-books on these important subjects depends upon a fairly unanimous opinion as to accomplished facts.

The ultimate rules or conventions, to which I principally refer, representing or flowing from circumstances and conduct liable to progress and change, will naturally vary somewhat as time goes on, and will consequently be, on occasion, the subject of party controversy. For the most part, however, they are capable of being reduced to perfectly definite terms. On the few points on which the one or the other view has not arrived at a decided prevalence in juristic authority, the statutory decision of the usual modern Parliamentary Sovereign can, of course, come in as a last resort. Whether there may not be occasions in which the authority of such Sovereign itself might be very unwisely interposed to effect Constitutional changes, in the face of serious opposition by an important minority of the Nation at large, is a question which I have discussed elsewhere (§ 4, pp. 259—261).

The above remarks bear mostly upon the case of modern and principally English Constitutional Law. On the formation

or the "composition" (see § 7, p. 344) of Constitutional Law at Rome, not much has come down to us which can be assigned to the legal Text-book writer. The great growth of Private[3] Law, which *was* due to professional agency, and of which Justinian's Digest is the repertory, did not begin until the general constitution and functions of the Senate and the Popular Assemblies had settled, by Statute and Usage, into the ultimate condition in which they went down, except in form, under the autocracy of the Empire. Gaius and Pomponius give us a very brief account (enlarged, with a few other references, above in § 6) of the acquisition of legislative and judicial powers by the various bodies which nominally retained those powers in their own time. Cicero's speeches and letters refer frequently to the Constitutional Practice of his. But the same author's books written expressly on the Law, Constitutional or otherwise, do not give us either a very complete or apparently a very trustworthy view of their subject[4]. We are therefore almost in the dark as to how far the Constitutional Practice of Rome may possibly have been systematised or modified by suggestions of Roman lawyers. What are reported to us, by our historians, in the way of Constitutional developements, are generally alleged or real Statutes, occasionally statements of changed state practice, and more rarely individual acts of the executive, which became a precedent.

Under the first head come the compacts and compromises between the Orders, embodied in the earlier so-called *Leges* (see § 6, p. 321), the Twelve Tables, and occasional subsequent enactments, including in chief the final recognition of *plebiscita*

[3] I use the term here, by anticipation, as more obviously antithetical to Constitutional Law than "Civil." See however above, § 7, pp. 366, 367. As to the necessity, in logic and in common sense, for the *triple* division of a Code into Civil, Criminal and Constitutional, below, § 10, p. 447.

[4] See, as to Cicero, Sources, pp. 84, 85: as to Aelius Stilo, and Cincius, pp. 68, 69: as to Pomponius, p. 70.

by the *lex Hortensia*. Under the second head must be placed our very slight and fragmentary account of the assumption of legislative power by the Senate. To the third I would refer the Constitutional reforms effected by Ap. Claudius Caecus, and apparently by Flaminius, in their respective Censorships c. 304 and 225 B.C.[5]

The laws of the Gracchi and their adherents are primarily economical and agrarian; only incidentally constitutional. Nor does the extension of the franchise after the Social War alter the general form of the Constitution. Sulla's legislation, on the other hand, was an attempted reconstruction of the whole system, on earlier and more aristocratic or plutocratic lines. This was the régime which ended in the Civil War and the final domination of the head of the army, after the brief interval caused by the senseless murder of Caesar.

3. On International Law. *Mutatis mutandis* most of what has been here said of Constitutional Law—at any rate, of that part which Professor Dicey calls Constitutional Convention—applies to the system of rules known as International Law, which has been often compared with the Constitutional Law of a particular State, in respect of its origin and sanctions. The structure is, it is true, a comparatively modern one, and its likeness to those older growths may be pressed too far. But the basis and formation of International Law, are certainly illustrated and explained by reference to the elements of general approval, occasional express recognition, and professional formulation, in which I believe both the Constitutional Law of all States, and the general Law of all old States, to have first originated. Only, in International Law, the part of the Text-book writer has been, and still is, infinitely more important than in National.

[5] Some of these subjects are briefly referred to in § 4, p. 206, § 6, pp. 324, 326, § 7, p. 355, &c. They are only treated in detail in the following history.

Between independent States there is, *ex hypothesi* no Sovereign, and therefore no over-riding or competing legislation, statutory or judicial (see however below, p. 426). To tabulate precedents, which could only be regarded as binding, on a presumption of consistency, upon the National executive or judicative from which they proceeded; principles, which had often to be inferred from agreements only valid between the parties to them: to build together these materials into a structure based on general grounds of justice and humanity—this was the noble work of Grotius and his successors: and, until the middle of the last century, it must be regarded as their work alone.

It is stated by Professor Oppenheim that at the end of the 17th century the civilised States "considered themselves bound" by a Law of Nations the rules of which were to a great extent the rules of Grotius[6]. But this feeling of obligation was so vague and general, and the rules in question, when applied to any conflicting national interests, so much contested, that a Law of Nations can scarcely be considered as much more than a pious aspiration, for a century later than the date fixed by the learned author above quoted.

Blackstone, it is true, assumed the existence of a Law of Nations as "a system of rules deducible by natural reason and established by universal consent among the civilised inhabitants of the world." This "universal consent," however, was obviously not an ascertained fact so much as an *a priori* deduction from the Law of Nature or theoretical *Jus gentium*, to which reference has repeatedly been made above (§ 1, p. 27, § 2, p. 66, &c.). And the actual "adoption" of this universal Law "by the Common Law of England" which Blackstone, in the same passage, alleges, was not only, as a

[6] International Law[2], i. 60.

matter of adoption, voluntary, but, as would appear from his instances, limited and partial[7].

The greater part of the rules now known by the name of International Law—at any rate as relating to War—have been developed since Blackstone's time, and formulated by modern Jurists out of the practice of modern nations, together with the practice (in the more technical sense) and the decisions of their respective Courts. Less weight has rightly been given to special conventions or agreements between one individual nation and another, since these must be regarded as prompted and limited by the circumstances of the particular case, rather than as expressing a general acceptance of the principles followed.

In this process of juristic formulation, it was naturally inevitable, under the varying geographical and economical conditions of individual nations, that wide differences of practice and opinion should arise between their respective Courts and jurists, particularly as to what was Right or Reasonable in Sea Traffic and Naval or other War. Nevertheless, there undoubtedly had been formed, before the various declarations and conventions to which I come next, a certain amount of rules definitely ascertained by most jurists, and practically adopted by the consent, or rather the comparatively unanimous conduct, of the leading civilised States. These rules had only, for their sanction, such general avoidance or distrust, as would almost certainly be incurred, and such particular acts of unfriendship or hostility, as might possibly be incurred, by a breach of them. But, in the actual effect even of this degree of sanction, ordinary men saw enough reason for regarding such rules as Law and calling them so. For though it is but a question of names, the denial of the name to clearly ascertained principles which had, in practice,

[7] See Blackstone, Comm. i. 7. 253—256: ii. 1. 5—7, and generally, iv. 5, with the comments on him in P. J. pp. 182—184.

facilitated the amicable settlement of differences between Nations, which had therefore presumably prevented the occurrence of War, and which had certainly mitigated its horrors, did in the minds of many involve a degree of disparagement both unjust and undesirable.

This is one of the chief cases where an endeavour may well be made to bring rules of conduct, excluded by Austin's requirement of command, under some wider conception of Law, on grounds alike of fact and of general utility.

I will not repeat what has been said above (§ 2, pp. 90, 91) on this subject, but will end by calling attention to the three main deficiencies which have been specifically urged, since Austin's time, against the claim of International *Law* to that name; with the view of seeing how far they have been supplied through the important common action recently taken by the leading modern Powers.

These deficiencies were, as alleged: (1) the want of a recognised organ of legislation; (2) the want of a recognised Court or Tribunal; (3) the want of any recognised mode of enforcing the decisions of such Tribunal, if established.

From the close of the Crimean War, various attempts have been made to arrive at some agreement, between civilised nations, upon matters of dispute on points of International Usage in Warfare, mainly Naval. In the Declaration of Paris signed, 1856, by delegates of all the great European Powers but Spain, certain general principles were recognised as settled, which involved, amongst other things, the surrender of a very important Right, hitherto insisted on by the chief Naval Power of the time, Great Britain. It is unnecessary here to go into the individual points of that Declaration. For my present purpose it is enough to say that the surrender referred to, though often stigmatised as a national mistake, has not been, and is not likely to be, disclaimed or seriously questioned, as a rule of national conduct, by the Power chiefly concerned;

that the Declaration itself has been subsequently signed by a majority of States other than the original signatories, including Spain; and that even by those which have declined to sign, e.g. the United States, no opposition in practice has been made to its principles[8].

From the end of the 19th century, further declarations and conventions have been made or entered into by representatives of most of the principal powers, both of the Old and New World on International Rights and Duties. Of these declarations and conventions I can only refer in brief to such as bear most directly upon the three deficiencies above imputed to International Law.

The first Hague Peace Conference, initiated by the Russian Emperor among the Powers accredited to St Petersburg, resulted *inter alia* in a Convention for the pacific settlement of International disputes and the Establishment of a permanent Court of Arbitration, which has heard and settled several important cases[9]. The establishment of this Court was agreed to, on the part of England, in the same year (1899), and its present constituents will be found in the Statesman's Year-Book for 1912 at p. 1341. It is stated, in the Convention, to be understood, as a matter of good faith, that the parties who sign the "*compromis*" or reference to arbitration, should submit loyally to the award[10]. But this body, though most valuable not only for settling immediate differences but for the recording of important precedents, can scarcely be considered as constituting a legislative or even, to speak strictly, a judicative organ. A much nearer approximation to such an

[8] Oppenheim[2], i. 69. It must be admitted, however, that the conversion of merchant into war ships and the establishment of volunteer navies in war may attain a good many of the objects, and revive some of the results, of privateering. See Higgins, War and the Private Citizen, pp. 118—123.

[9] Higgins, Hague Peace Conferences, pp. 44—50.

[10] Art. 18. See also, Art. 31. Higgins, Hague and other Conferences, pp. 40, 47, &c.

organisation is to be found in the following agreement by representatives (for the purpose at least of Conference) of all the Great Powers, to the formulation of a very considerable common Code and the establishment of a common Tribunal.

At the second Peace Conference, held at the Hague in 1907, a Convention was drawn up for the joint formation of an International Court of Appeal on the important and vexed question of Prize in Naval War. This Convention was signed without reservation by a considerable majority of delegates from all the greater Powers of the world including Spain and the United States (see above, p. 424) and the new power of Japan: it is justly regarded as the principal achievement of the particular Conference[11] and seems to afford, with the Declaration, of which I have next to speak, good hope for the formation of International Rules which may almost satisfy Austin's definition of Law. It must, however, be admitted that neither the Convention nor the Declaration which was meant to be auxiliary to the Convention[12] has as yet been ratified by the Powers themselves, although in the important case of the United States the Senate has passed a resolution empowering the President to ratify the Declaration. Possibly the hesitation to ratify may be partly due to delay caused by a difference between the Houses of our own particular Parliament[13]. But undoubtedly there is, among many English jurists, a strong objection to England's ratification, based perhaps not so much upon the principles which have been

[11] Higgins, Hague Peace Conferences, p. 521.

[12] On the avowed object of the Conference of 1908—9 see Sir Edward Grey's letter, Blue Book No. 4 (1909), p. 1.

[13] The Convention and Declaration were practically approved by the House of Commons in the debate and division on the Naval Prize Bill which was passed in that House but thrown out in the Lords. See, for the text of the Bill, Oppenheim[2], ii. 683 et seq. particularly Pt. iii. on the International Prize Court.

enunciated as upon the disputed points which have been left open. I proceed, however, to the Declaration itself.

The International Naval Conference of London (1908—9) was held with a view to agreement upon the "generally recognised rules" of International Law, in accordance with which the above named Court was to decide the Appeals coming before it. A Declaration was accordingly signed by the representatives of Germany, America, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands and Russia (all the Powers represented), containing a series of rules on Naval Warfare which were agreed to correspond in substance with the generally recognised principles of International Law. Article 66 of this Declaration runs as follows: The signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration (*s'assurer l'observation reciproque*) in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take such measures as may be required in order to ensure that it will be applied by their Courts and more particularly by their prize Courts[14].

Distinctions have been made between the Convention and Declaration as to which is the proper organ, or department of Sovereignty, to ratify either respectively. The question, too, of *obligation* upon the proper department, when settled, to effect such ratification, has been debated. Supposing these difficulties to have been settled and the ratification duly effected it may be of interest to consider what will be the effect *pro tanto* upon the position of International Law.

An express mode of enforcing obedience to the decisions of the tribunal thus established, and generally to the rules contained in the Declaration is, and probably will remain, wanting.

[14] Blue Book cited above, p. 90. See the Commentary on this Article, ib. p. 66.

The opening words of the important Article 66, quoted above, undoubtedly appear to justify, if not to require, intervention by the signatories against any infringement of the rules of the Declaration, in the case specified. It is laid down, moreover, by Professor Oppenheim that "if a State violate such rules of the Law of Nations as are universally recognised, *or laid down in lawmaking treaties*, other States have a right to interfere and to make the delinquent submit to the rules concerned." For example, "if a State which is a party to the Hague regulations concerning Land War were to violate one of those regulations, all the other signatory Powers will have the right to intervene[15]." The reasoning of course applies equally to the Declaration of 1909, and is certainly supported by Art. 66: yet it may perhaps be questioned whether in the event of War a more limited interpretation might not be put upon that Article as a whole: so that any *individual* intervention might be made out to be a volunteered Act of National Policy and possibly call forth a counter intervention of some rival third Power. The sanctions of International Law must, it seems to myself, until the somewhat improbable formation of an International Police, strong enough to overawe individual opposition, remain much as defined above (p. 422); the negative side of them being distinctly strengthened, however we may doubt the positive. But, in actual effect, under the more and more complete formulation of its rules, and their admission by so large a part of the civilised world, the infraction of those rules becomes daily more inconceivable. However desperate the case of a nation almost *in extremis*, upon which some particular prohibition may press hardly, it is almost certain, apart from questions of good faith, that the consequences of disregard would in the end be worse than the immediate disadvantage of obedience.

To return, however, to the functions of the Text-book

[15] Oppenheim[2], i. 191.

writer, in this particular branch. The Codification of International Law, which has been assumed to be practically carried out *pro tanto*, may probably be extended ere long over the whole field: but the establishment of a standing legislature for International relations cannot be regarded as equally probable, and the gathering together of an influential congress can only be on favourable occasions. There will still be, as in the case of other Codes, room for Interpretation and extension, by reference not merely to the Judgements of a Court of Appeal and to the scattered decisions of National Courts sitting on International questions, but also to other National Acts and to entirely new questions, such as may arise, for instance, out of the increasing practice of "aviation."

In all this there is scope and need for the jurist in the particular capacity of Text-book writer. There is also the opportunity for undue national predilection and partisanship, to which writers on the present subject are naturally liable: not less so than International Boards of Arbitration themselves, when they are left to decide on "general principles" instead of definite rules (see above, § 3, p. 146). This leads me to speak of one of the most valuable features in the Jurisprudence of these latter days, and not merely as bearing on International Law. I mean the growth of International Societies formed, and Reviews &c. conducted by distinguished Jurists of different Nations: to which influences may be added, in particular, the recently projected Academy for the Study of International Law at the Hague.

A few remarks may be added, in conclusion, upon the *style* of International Law, past and present, and upon the subdivision of the body of rules now mostly known by that name, although the latter subject more properly belongs to the following section (Public and Private Law). The Roman title *jus gentium*, by which those rules were long very generally designated, was certainly somewhat misleading. The thing

most nearly corresponding to International Law in Roman parlance seems to have been the *jus fetiale* obtaining between the early communities of Italy. As this appears to me to be mainly a matter of simple antiquarian interest, I shall content myself with referring to what I have written upon it elsewhere[16]. Dr Phillips, indeed, in his learned work on "The International Law and Custom of ancient Greece and Rome" finds the fundamental principles usually attributed, at least as far as putting into form, to Grotius, already existing in ancient history. The same ground was partially gone over by Grotius himself: for the rebuilding of the edifice, which, if it ever existed, had been shattered in the chaos of blood and bad faith that excited Grotius to his immortal work (Prolegg. § 28), we need not, as it seems to me, go behind that great name. For the developed system, certainly, of modern International Law I cannot trace much definite continuity with the general principles elaborated by Dr Phillips.

To return to *jus gentium*. The term is, as is well known, used by the Roman writers in two different senses. In its wider philosophical meaning, as generally understood, for instance, by Cicero, whether we consider it an Utopian ideal or a state of things which its votaries half believed to be true, it would certainly cover, *inter alia*, any rules governing the relations between the Roman Republic, as head of Italy, or the early Empire, and other nations. But under the more frequent application of the phrase by the Classical Jurists, and notably where it is employed by Gaius and Justinian to designate a part source of the law in use at

[16] P. J. pp. 178—180. See, however, Dr Phillips' work referred to above. Also Mommsen, Sr. i. 252. 6 on the observance of the *forms*, and perhaps the principles of *foedus* through the Republic, and their revival by the antiquarian Emperor Claudius (Suet. 25). The *college* of Fetiales, Mommsen adds, subsisted after, as before.

Rome[17], it is more definite and narrow. The *jus gentium* of the Institutes is not so much International as Common National Law: and, as such, was clearly distinguished by Grotius from the sense in which he himself sometimes elected to use the phrase, i.e. as having to do not simply with the internal tranquillity of each nation, but with the mutual "society" of the nations themselves[18]. "International Law" is a convenient and expressive term, due to Bentham following an idea of D'Aguesseau[19], which, having first established itself in English, is gradually superseding Droit des Gens, &c. in continental rendering. It would be absurd to attempt now any substitute for the latter part of the compound, on which I have only to remark that the parties, between whom this Law obtains, are better designated as States than as Nations, for reasons into which I need not enter again (see above, § 4, pp. 149, 150).

Municipal, meaning National, as opposed to International Law, is a somewhat indefensible term, but one which is now difficult to disturb. It evidently existed before Blackstone, as he uses it, "in compliance with common speech[20]." It depends, apparently, upon an analogy between the independent States of modern Europe and the free towns of the Roman Empire; possibly dating from a time when the Sovereign of the so-called *Holy* Roman Empire was regarded as the temporal Head, if not of the world, at least of Christendom, and the Nations as nominally subordinate[21].

[17] Gaius, 1. 1; Just. 1. 2. 1.

[18] Compare Grotius, 1. 1. 14 (with notes and references) and 2. 3. 5.

[19] Bentham, Principles of Morals and Legislation, xvii. 326, n. 1. The reference to the *English* Works, seems to be i. 149, n. Also Holland[10], xvii. 380, n. 1. Zouch, however, Regius Professor of Civil Law at Oxford, seems to have first started the idea, in his Juris et judicii fecialis, sive *juris inter* gentes, explicatio &c., published 1650.

[20] Blackstone, Comm. i. p. 44.

[21] Bryce, Holy Roman Empire, especially chs. 6, 8, 12 and 15.

Public and Private International Law. This well-known division does not seem (below, § 10, p. 446) to be open to so much objection as the making Public and Private a main division of National Law, of which division it is entirely independent[22]. Professor Holland, who accepts the latter division, objects strongly to the former, shewing in his chapter on the Application of Law that questions of the proper Forum and the proper Lex may occur both in Civil and Criminal cases, the Criminal Law coming, in his system, under the head of Public[23]. Professor Westlake, following the usual division and phraseology, holds that the selection to be made in each *action* between various jurisdictions and laws may not unreasonably be called International Law distinguished by the epithet Private from the International Law which "prevails between States" and which may be distinguished as Public. He admits, in the same passage, that the question of the principles on which treaties for the Extradition of criminals ought to be based, being intimately concerned with the question in what national jurisdiction a criminal ought to be tried, is not separable from Private International Law, as here (i.e. in his work on that subject) understood. But the whole subject of Crime, in this point of view, and of Extradition, is actually taken in Westlake's Public International Law (of Peace, ch. 11). Foelix, by whom the style and division of Private International Law was first brought into prominence, includes the *droit criminel international* in his *Droit International privé* (L. ii. Tit. ix. See also Demangeat's note to the first chapter of the whole work).

From these differences, apart entirely from Holland's division of National Law, it does not seem to me that either the exact province, or the style, of Private International Law

[22] Westlake, Private International Law, p. 5.

[23] Holland[10], p. 211.

are very clearly to be explained. The former may be empirically taken simply as the matters contained in Westlake's excellent book bearing that name. I still, however, confess my own preference for the more comprehensive "Conflict of (National) Laws[24]." The settlement of this conflict may be properly regarded as falling within International Law general, or International Law pure and simple, of which I myself should prefer to consider it a part, rather than an independent subject[25].

[24] Which is preferred by Professor Dicey, writing under that style, and, *faute de mieux*, by Holland, l.c. See, too, Wheaton[4], 10[a], p. 16.

[25] On this point of view, see Despagnet, Droit International Privé[4], § 12, p. 28.

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